TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 690.

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

O. B. KNAPP.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED NOVEMBER 3, 1915.

(24,973)

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1 STATE OF MINNESOTA,
County of Meeker:

District Court.

O. B. KNAPP, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Plaintiff for his complaint in the above entitled action alleges and shows to this Court:

First. That the defendant now is and at all times hereinafter mentioned has been a railroad corporation owning and operating a line of railroad extending into and through the Village of Dassel in the County of Meeker and State of Minnesota.

Second. That at said Village of Dassel, Meeker County, Minnesota, defendant has and did have and maintain at all times
2 herein mentioned a certain pump-house, in which was situate a certain pumping engine and machinery; that on or about the 12th day of May, 1904, this plaintiff was employed by defendant as its agent and servant and as such was working in the vicinity of and around said pump and machinery in said pump-house of defendant in said Village of Dassel, Minnesota.

Third. That on or about said 12th day of May, 1914, while this plaintiff was so the servant and employee of said defendant, he was required to and did work in close proximity to a certain dangerous machine and pump in said pump-house and that there was situated on said machine a certain dangerous and unguarded clutch or knuckle which revolved when said machine was in motion at a high rate of speed.

Fourth. That said machinery because of said unprotected and unguarded clutch was dangerous to employees working in the vicinity thereof, and that at all times herein mentioned it was feasible and practicable to guard and protect the same so that employee- working in the vicinity thereof would not be liable to receive injuries by coming in contact therewith.

Fifth. That said defendant negligently, recklessly and carelessly failed and neglected to protect or guard said dangerous and unprotected clutch and machine and negligently failed to provide any
3 guard or protection whatsoever for the same to the end that the place in which plaintiff was compelled to work would be made reasonably safe for such purpose.

Sixth. That on or about said 12th day of May, 1914, and while plaintiff was working around and about and in the vicinity of said dangerous and unguarded clutch and machine the sleeve of plaintiff's right arm was caught by said unguarded and unprotected clutch and plaintiff's arm was pulled and jerked into said rapidly revolving machinery and his arm so severely injured, torn and

lacerated that the same had to be severed and amputated just below the elbow; that plaintiff received a severe shock to his nervous system by reason of the severe and sudden strain and jerk at said time and that plaintiff was pulled and thrown forward onto said machine and received a severe and permanent strain and injury to his back and spine and that as a result of said injury plaintiff's general health has been greatly and seriously affected and that he received internal injuries the exact and precise nature of which he is at this time unable to state.

Seventh. That by pleading the specific acts of negligence hereinbefore recited, plaintiff does not waive the right to prove any other acts of negligence not inconsistent with the acts of negligence hereinbefore set forth.

Eighth. That prior to the injury to plaintiff he was an able-bodied man and could and did earn the sum of One Hundred and
4 Twenty Dollars per month; that as a result of said injury he has been incapacitated, and lost his ability to perform any manual labor, and totally lost his earning capacity.

Ninth. That as a result of said injuries plaintiff has been obliged to pay out and expend large sums for medical attention, medicines and nursing and will be compelled so to do for the rest of his natural life.

Tenth. That by reason of all the facts aforesaid plaintiff has been injured to his damage in the sum of Thirty Five Thousand ($35,000.00) Dollars.

Wherefore, Plaintiff demands judgment against said defendant in the sum of Thirty Five Thousand ($35,000.00) together with the costs and disbursements herein.

JOHN I. DAVIS,
Plaintiff's Attorney, Benson, Minnesota.
DAVIS & MICHEL,
Plaintiff's Attorneys, Marshall, Minnesota.

Dated this 9th day of October, 1914.

STATE OF MINNESOTA,
County of Meeker:

District Court.

O. B. KNAPP, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Answer.

Defendant answering the complaint of the plaintiff herein:

1. Admits that it is a railroad corporation and admits that it owns and operates the line of railroad referred to in plain-
5 tiff's complaint, and alleges that said line of railroad so referred to is an interstate railroad running into and through

the state of Minnesota and other states, and that there is operated on said railroad by this defendant trains carrying interstate commerce.

2. Defendant admits that at the village of Dassel in Meeker County it maintains a pump house in which is situated a certain pumping engine and machinery, and alleges that said engine and machinery furnished water to defendant's engines engaged in the transportation of interstate commerce.

3. Defendant admits that this plaintiff was employed by it in the operation of its said pumping station at said Dassel, Minnesota, and admits that on the 12th day of May, 1914, while this plaintiff was engaged in work connected with the operation of said pumping station that plaintiff received personal injuries resulting in the loss of one of his arms below the elbow.

4. Defendant alleges that at the time plaintiff received said injuries he was engaged in work connected with the movement of interstate commerce.

5. Defendant further answering alleges that such injuries as plaintiff received were not caused or occasioned by any negligent act or omission of this defendant, but the same were caused and occasioned by plaintiff's own contributory negligence and carelessness.

6 6. Defendant further answering alleges that such injuries as plaintiff received while engaged in performing the work as alleged in his complaint involved certain dangers, risks and hazards which were incident to such work, all of which dangers, risks and hazards plaintiff well knew and appreciated, and all of which plaintiff assumed, and that such injuries as plaintiff received resulted from the dangers, risks and hazards so appreciated and assumed by plaintiff as aforesaid.

7. Except as hereinbefore admitted or otherwise answered, defendant denies each and every allegation in plaintiff's complaint contained.

Wherefore, defendant prays that plaintiff take nothing by this action and that it have judgment for its costs and disbursements herein.

M. L. COUNTRYMAN AND
A. L. JANES,
Attorneys for Defendant,
203 *Great Northern Building, St. Paul, Minnesota.*

STATE OF MINNESOTA,
County of Meeker:

District Court.

O. B. KNAPP, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Reply.

Plaintiff, for his Reply to the Answer of the Defendant in the above entitled action alleges and shows to this Court:

7 Plaintiff denies each and every allegation and each and every part thereof in said answer contained except as the same admits the allegations of plaintiff's complaint.

Wherefore, Plaintiff prays judgment as demanded in his said complaint.

JOHN I. DAVIS,
Plaintiff's Attorney, Benson, Minnesota.
DAVIS & MICHEL,
Plaintiff's Attorneys, Marshall, Minnesota.

Dated this 21st day of November, 1914.

STATE OF MINNESOTA,
County of Meeker:

District Court.

O. B. KNAPP, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Settled Case.

Called for trial December 10th, 1914, at 3 o'clock P. M. before Hon. G. E. Qvale, J., and a jury.

John J. Davis and Davis & Michel appeared as counsel for plaintiff and A. L. Janes appeared as counsel for defendant.

Jury sworn.

It is stipulated by and between the plaintiff and defendant that the plaintiff at the time of his injury alleged in the complaint was engaged in the interstate commerce and that the defendant was engaged in interstate commerce and the complaint may be amended to conform to the facts as stated here.

8 O. B. KNAPP, called in behalf of plaintiff, was duly sworn, examined by Mr. Tom Davis, and testified as follows:

Q. You are the plaintiff in this action?
A. Yes, sir.
Q. What is your name?
A. O. B. Knapp.
Q. Your home is at Dassel, Minnesota?
A. Yes, sir.
Q. How long have you lived in this County?
A. I have lived in this County 44 years.
Q. When you first came to this County what was your business or occupation?
A. I was a farmer when I first came to the County.
Q. How long did you farm?
A. 2 years.

Q. Then what business did you go in to?
A. Working for the railroad company.
Q. What railroad company?
A. It was then the St. Paul & Pacific Railroad Company.
Q. Now the Great Northern?
A. Yes, sir.
Q. How long had you been in the employ of the Great Northern Railway Company previous to your injury?
A. In one service a little over 38 years. I commenced September 1st, 1872, making about 42 years since I first commenced.
Q. What has been the nature of your work for this company?

9 A. Station work, agent and operator.
Q. How many years have you been station agent and operator at Dassel, Minnesota?
A. About 26 years—27.
Q. For the past 10 years you have been employed there at Dassel?
A. Since 1900.
Q. Your work at Dassel is what, tell the jury?
A. My work is running the station, all work connected with the station and as operator and running this pump that is connected with this business there at Dassel.
Q. There is at Dassel a pumping station?
A. There is.
Q. In that pumping station is a pump and gasoline engine?
A. Yes.
Q. That refers to the pumping station, and taking this track or this surface as we stand here, I will ask you which direction the pump runs as to running east or west?
A. The pump lies north and south, did at that time.

(Photographs marked Exhibits "A" and "B.")

Q. Handing you Exhibit "A" I will ask you to examine it carefully and state whether it reproduces, whether that is a substantial reproduction of the pump house as it existed at Dassel at the time of the injury?
A. Yes, I should say it was.

Plaintiff offers in evidence Exhibit "A."

Q. Handing you Exhibit "B" I will ask you to examine
10 it carefully and state whether that is a reproduction of conditions there, or if there is any difference—does that represent a portion of the engine and the pumps. Look it over carefully and if there is anything that does not represent so state?
A. There is one little difference here.
Q. What is it?
A. This oil cup there wasn't there, this down here was here, this evidently has been taken some time ago because we used to years ago, used to have the oil cup set in that condition.

(Photographs marked Exhibits "C" and "D.")

Q. Handing you Exhibits "C" and "D," I will ask you if those

substantially reproduce the condition of the engine at the pump house together with the hood and the clutch at the time of your injury?

—. ——.

Plaintiff offers in evidence Exhibit "C."

Q. I will ask you if Exhibit "D" substantially represents the entire view of the hood, the crank shaft and a wheel as it was at the time of your injury?

A Yes, sir.

Plaintiff offers Exhibit "D" in evidence.

Q. That is the pump which is in the station as you know the station, as shown in this exhibit?

A. You mean the pump house?

Q. As you enter the pump house, as you come in which direction is the pump, to your right or your left?

A. The pump is squarely in front of the door.

11 Q. To which direction is the engine, to the right or left?

A. To the right of the pump as you come in.

Q. Then that which shows in the door-way of Exhibit "A" is a portion of the pump, is it—or what is that that shows in the door-way?

A. This does not show any of the pump, but it shows a part of the main shaft and the clutch.

Q. That would depend, of course, on the angle where the camera stood, to the right or left of the door-way?

A. If it had been at the right of the door-way it would not contain the pump, the photograph was evidently taken just right squarely from the front.

Q. Did you go down there to the pump house on the 12th?

A. Yes, sir.

Q. What for?

A. To start the engine.

Q. When you went down there, turn to the jury and tell them just what you did?

A. I went, of course, first to the door, unlocked the door, the door was locked as we usually kept it locked. I walked into the house and around to my right between the wall and the engine and pumped up the gasoline, which we had to do to prime the engine before starting, that was my first duty, that I did; then I walked around the back of the engine, that would be on the east side of the engine and there is two oil cups that oil the main shaft, one on either side of the crank-shaft, I raised the lids of these and took the oil out

12 of the pail that stood underneath in which we had a cup; I took the oil out and filled those two cups before starting the engine; I then reached over the battery that turned the current on, which was immediately back of that on the wall, I went to that and turned the current on and then came back to the wheel, the large fly-wheel, a wheel that is nearly six feet in diameter, which we had to start. I had to get on it with my foot and take hold of the upper

spokes in order to start it. I generally had to turn it probably 2 or 3 times around before the gasoline would explode, I turned it until I got the first explosion.

Q. Had you oiled the engine before starting it?

A. Yes, I had oiled the only place on the engine we did oil.

Q. Then you had nothing more to do with the engine?

A. Nothing more to do with the engine.

Q. Then where did you go?

A. After starting the engine we usually have to wait a moment or so for the engine to get speed enough to start the pump to get it started off at once. While I was waiting for that I walked back around the wheel that was going and went to the pump, which was not in motion, was standing still. The pump is a triple pump, 3 pumps in a line. These bearings that are just above them have hard oil cups, those are filled with hard oil. In starting or just before starting I usually turn them up so as to pass the oil through on to the bearings. That is, I turned three of those up, that wasn't running.

13 Q. You were speaking of 3 oil cups on the pump, can you show them on exhibit "B?"

A. Yes, here they are, those three right there.

Q. I have put the figures "1," "2," "3" on exhibit "B," I will ask you if they represent the position of the oil cups which you just testified regarding that are on the pump?

A. Yes.

Plaintiff offers in evidence exhibit "B" so far as it refers to the oil cups and figures "1," "2" and "3" and for no other purpose.

Q. When you got through, as you were turning the oil cups on the pump was the pump in motion or not?

A. No, sir.

Q. Then what did you do?

A. I was standing in this position, right this way (indicating) with my right hand here, with my left turning up those oil cups, and started to walk around the wheel, here was the large fly-wheel here.

Q. Was the clutch that is shown on exhibits "C" and "D" as you stood there to re-fill the oil cups, was the clutch and crank shaft to your right or left, as you stood there?

A. As I stood there it was to my left.

Q. You were between this clutch and pump?

A. Rather right in front of the pump.

Q. Then, proceed and tell the jury what occurred then?

14 A. As I started away from the pump (this is the pump here) I had not taken a step I don't think—I don't know just how exactly, but not more than a step, I felt something pulling at my coat, being jerked. I was being drawn over.

Q. Over towards what?

A. Over towards the clutch, towards this crank shaft, one side of it was running—this was the side that was running, next to the engine. I was being pulled over that way, I apparently could not stop myself—I didn't see how I was going to stop myself——

Defendant objects.

I was pulled over in this shape (indicating) so there was no possible way——

Defendant objects—he should tell what he did, not what he thought he could or could not do.

Q. State what you did.
A. When I was drawn towards that clutch I threw my hand forward to catch myself.
Q. Forwards towards what?
A. Towards this hood that covers the crack-shaft.
Q. Then what happened?
A. My arm was taken off, that was all.
Q. What was it that took your arm off, what part of the engine was it?
A. It was the crank-shaft.
Q. The crank-shaft over which this hood partially goes?
A. Yes, sir.
Q. At the time your arm was taken off, tell the jury whether you realized immediately whether your arm was off or not?
15 A. No, sir, I didn't. I stood in this position, this part of my coat off, my coat being pulled down from the shoulder down, I thought I had—well I happened to look down and saw some blood on the floor, I wondered how it came there, just as I thought that I noticed my arm was gone—that is the first I knew my arm was off. I did not feel the jerk when it took it off.
Q. You may state whether you turned around, felt that jerking at your coat, whether or not you lost your balance?

Defendant objects as leading.
Objection sustained.

Q. Tell the jury what happened to you when you turned as to losing your balance or not?

Defendant makes the same objection.
Objection overruled.

A. I lost my balance, yes, sir.
Q. Do you know what the condition of the floor there is as to being greasy or not?
A. Yes, it was greasy.
Q. Are you able to tell at this time what caused you to lose your balance, the greasy floor or being caught in this clutch?

Defendant objects as leading.
Objection overruled.

A. No, sir.
Q. You are able to tell whether it is one or the other?

Defendant objects as leading, it may have been other causes, he limits it to those two causes.
Objection overruled.

16 A. Yes, it was one of those two causes.

Q. This clutch and the bolt upon it, did the bolt extend forward as shown on exhibit "C," the bolt which you say caught your coat on the clutch?

A. Yes, sir.

Q. Have you any other reason which you can give to the jury why your coat caught there, otherwise than slipping?

Defendant objects as calling for a conclusion and leading the witness.

Q. Can you give the jury any other facts which, in your judgment, might have caused your coat to become caught there?

A. Yes, sir.

Q. Tell the jury?

A. It is possible——

Defendant objects to the witness telling what was possible.

Q. State whether there was any draft made that could have drawn your coat in there?

A. It is possible that the draft from the fly-wheel might have drawn my coat as it was loose at that time and might have caught my pocket or some part of the coat.

Defendant objects.

Q. After your injury did you go back to Dassel and look over the situation?

A. After I left the hospital, yes, sir.

Q. Where was your arm taken off, what portion of the arm?

A. You mean at the hospital?

Q. No, now, what is its condition?

17 A. Right at the elbow joint.

Q. Where was it taken off there when it was torn off by the crank-shaft?

A. Half way between the wrist and the elbow.

Q. How long was you at the hospital?

A. It lacked one day of 4 weeks.

Q. How long have you worked with a gasoline engine?

A. I had run a gasoline engine about 13 years, all told.

Q. From your experience in running a gasoline engine are you able to tell this jury whether or not it would have been practicable to have protected this crank-shaft?

A. Yes, sir.

Q. In what way?

A. The jury have not seen these photographs yet.

Q. Tell the jury in what way?

A. That covering there over the crank-shaft is what is known as a hood, that could have been extended a foot at least more than it was, it could have been extended more than that.

Q. What about the sides?

A. The sides could have been covered with sheet iron.

Q. Can you give this jury an idea from your experience about how much it would have cost the Great Northern to have done that?

Defendant objects as immaterial.
Objection overruled.

A. Yes, sir.

18 Q. About how much would it have cost the company to have provided that covering?

A. Less than $5.

Q. At the time you were injured you may state to the jury whether or not you were working in connection with the engine in any way?

A. No, sir, I was not.

Q. You had worked there in the vicinity of this clutch and this pump and engine for several years?

A. Yes, sir.

Q. And never been injured?

A. No, sir.

Q. I will ask you if you had any idea or any thought that there was any chance of being injured while you were working there?

Defendant objects as leading, calling for a conclusion of the witness.
Objection sustained.

Q. What were you earning per month at the time of your injury?

A. The regular wages was $80 per month and commissions.

Q. What do you mean by commissions?

A. Work that I did for the Express Company was paid in commissions.

Q. About what did that average per month?

A. About $40.

Q. Your average per month at the time of your injury was about $120?

A. About that.

Q. Have you been able to do any work or perform any manual labor at all since your injury?

19 A. No, sir.

Q. As I understand you from your testimony, your sole means of a livelihood for at least 37 years past has been railroad work, station work?

A. Yes, sir.

Q. Which hand did you use?

A. I was right handed.

Q. In writing did you write with your right hand?

A. Always.

Q. Which hand did you use generally in and about your work?

A. My right hand.

Q. Since you have lost your right hand I will ask you if you have any difficulty in performing the ordinary functions of life?

A. I have.

Q. Does it cause you any inconvenience?

A. Yes, sir.

Q. Do you have any inconvenience in eating?

A. Yes, sir.

Q. In dressing yourself?

A. Yes, sir.

Q. In dressing and tying your shoe-strings is it necessary to have help?

A. Yes, sir.

Q. In washing yourself do you have any inconvenience in doing that?

A. A good deal of inconvenience.

Q. And in clothing yourself?

A. Yes, sir.

Q. Is it more difficult than prior to your injury?

20 A. Yes, sir.

Q. In fact in practically everything you do you find difficulty in doing anything after the loss of your arm?

A. Certainly, any manual work.

Q. You find it inconvenient in caring for yourself?

A. Yes, sir.

Q. When your arm was taken off at the hospital at Litchfield were you put under the influence of some chloroform or ether?

A. Yes, sir.

Q. How long were you in the hospital?

A. 4 weeks, lacking one day.

Q. 4 weeks that you were in the hospital, tell the jury whether or not you suffered any pain during that time, and state the nature of it?

A. It hardly seems to me necessary for me to make any statement on that question, the fact of losing my arm ought to be enough to anybody that has lost even a finger.

(Counsel for defendant:) It is admitted by the defendant in this case that plaintiff suffered extreme and excruciating pain during all of the time he was in the hospital at Litchfield.

Q. I will ask you this, whether or not this bolt upon the clutch could have been covered or protected by rubber cap could be or not?

A. Yes, sir.

Q. In your opinion was it practicable to have done so?

A. Yes, sir.

21 Q. At about what cost to the Company?

(Counsel for Defendant:) I presume about 10 cents.

Cross-examination.

By Mr. James:

Q. This pump house was in your charge, you took care of it?

A. Yes, sir.

Q. You cleaned it out?

A. Yes, sir.

Q. And looked after the engine?

A. Yes, sir.

Q. In fact you had sole charge of the pump house?

A. Yes, sir.

Q. It was one of your duties as station agent to look after the pump house?

A. Yes, sir.

Q. For how many years had you been doing that at Dassel?
A. Since December, 1905.
Q. A little over 8 years?
A. About 9 years, this is December.
Q. How many times a day during those, nearly 9 years would you go to the pump house?
A. I presume that it would average once a day.
Q. Any particular time of day?
A. No, sir, that depended on the amount of water in the tank.
Q. In other words it was your duty to see that there was plenty of water in the tank for the engines?
22 A. Yes, sir.
Q. You think that during these 9 years, or nearly 9 years, you were there on an average about once a day?
A. I should judge so, during a part of this time I was relieved and was away on a vacation.
Q. It was your duty to care for the machinery?
A. Yes, sir.
Q. And see that the machinery was properly oiled?
A. Yes, sir.
Q. See that the floors were in proper condition and clean?
A. Yes, sir.
Q. What kind of a floor did you have in this building?
A. Brick.
Q. How long had that brick floor been there?
A. Ever since the house was built.
Q. When was that?
A. 1905.
Q. That is when this plant was established there?
A. Yes, sir.
Q. What time of day was it that you were injured?
A. About 6 o'clock in the evening.
Q. It was broad day light at the time?
A. Yes, sir.
Q. Was it light in the house?
A. It is not very light in that house.
Q. How many windows are there in that house?
23 A. Two windows, two half windows, one on either side.
Q. What direction does the door of the house open?
A. West.
Q. It faces west, the house?
A. Yes, sir.
Q. When you went into it did you close or leave the door open?
A. I left it open.
Q. You left it open?
A. Yes, sir.
Q. As I understand it when you went into the door of the pump house the engine was on your right hand side?
A. Yes, sir.
Q. And the pump was on the left hand side?
A. Yes, you might say partially, it was on the left of the engine any way.

POOR

Q. Looking at Plaintiff's Exhibit "B," is the space between the pump and engine shown on that exhibit?

A. Yes, it is shown, yes, sir.

Q. And that space is there, I presume, but you cannot walk down between the pump and the engine?

A. No, sir, you have to go around the engine, between the south wall and the fly-wheel to get around there, you cannot go through that way.

Q. You came in the door and you went there first, as you came in the door?

A. I went right around to the right side of the engine.

24 Q. That would be towards the south of the engine?

A. Yes, sir.

Q. The right hand side of the picture?

A. Yes, sir.

Q. What did you do there?

A. I stopped right there by the Cylinder where the little gasoline pump is and pumped the gasoline into the cylinder.

Q. That is on the same side as the fly-wheel?

A. Yes, sir.

Q. Did you do anything else on that side of the engine?

A. Not then, no.

Q. What then did you do?

A. I walked around the fly-wheel.

Q. Back towards the door?

A. No, towards the east wall. I walked around the fly-wheel, raised up those two oil cups, this one here, (indicating) then there is one just like it opposite to it, but you cannot see that on the picture.

Q. Is that, looking at Plaintiff's Exhibit "B," looking down the space between the pump and the engine, we are looking at the crank-shaft, are we not?

A. That is the clutch.

Q. We are looking at the clutch then?

A. Yes, sir.

Q. Where the letter "A" is shown on Exhibit "B," that is the clutch?

A. Yes, sir.

25 Q. To oil those cups that you have just told the jury about, were you between the east wall of the building and the clutch?

A. Yes, sir, you might say "back" more correctly. I was standing immediately back of the engine, right exactly back of it, close to the fly-wheel.

Q. The oil cups that you just referred to that you turned up are shown by figures "4" and "5?"

A. Yes, sir.

Q. And at the time that you opened up these oil cups, "4" and "5," where were you standing?

A. Immediately behind the engine.

Q. You was standing between the east wall and the engine?

COPY

A. Yes, and the engine was not running.

Q. Taking Plaintiff's Exhibit "B" and as you go in the door, Plaintiff's Exhibit "B" here shows the location of the engine and the pump?

A. Yes, sir.

Q. And you are looking east?

A. Yes, sir.

Q. And the engine is located on the right-hand side of the picture?

A. Yes, sir.

Q. And you were standing back of the engine, between the east wall and the engine at the time you opened up those oil cups?

A. Yes, sir.

Q. What did you do to those oil cups, what did you open the cup for?

A. To put some oil into them.

Q. Did you put some oil in them?

26 A. Yes, I did.

Q. Did you close them up?

A. I don't think I did, I was in a hurry that night.

Q. Why didn't you close up the cups?

A. I didn't always close them, I was in a hurry that night, it was late I was trying to get through as quick as I could, I would not say but what I did, nor I would not say that I did.

Q. Would it have been more convenient for you to have stood in front of the clutch as shown by the letter "A" on this photograph or to have stood behind the engine as you did, to open those oil cups? We are referring to "4" and "5?"

A. It was considerably more convenient to stand right where I stood than it was to stand any other place about the engine.

Q. And after you had put the oil in those two oil cups, "4" and "5," then where did you go?

A. After doing that I went and reached up on the wall where the battery is and turned the battery on, just turned the battery on, then went back and got on to the fly-wheel, which I had to do, put my weight on it to start it and give it a revolution or two.

Q. After you started the fly-wheel what did you do?

A. Then I came back between the east side of the engine, on the east of the engine, between the wall and the east end and came to these oil cups on the 3 pumps.

Q. Those oil cups which you just referred to are "1," "2" and "3"?

27 A. Yes, sir.

Q. To get to the oil cups "1," "2" and "3" which way did you come?

A. I went back the same way I had come.

Q. You came out the east end of the engine?

A. I mean to say I did not come back around by the door, I came right back around the fly-wheel.

Q. The fly-wheel is on the right hand side of the picture?

A. To the left the fly-wheel.

Q. Then you walked around between the door and the engine and the pump?

A. No, sir, the other way.

Q. How did you get around there?

A. Between the fly-wheel and the east side of the house.

Q. Did you crawl in under the clutch?

A. No.

Q. Were these hard oil cups on the pump—were they on the back or front of the pump?

A. They are on both sides.

Q. What ones were you oiling that night?

A. The back ones.

Q. It wasn't the front ones?

A. No, it wasn't the front ones, I mistook that picture for the back of it, but they are just the same.

Q. After you had finished screwing up these hard oil cups on the back what did you do?

A. I raised up and started to go back around the fly-wheel and that was the time I was caught or slipped as the case may be, I don't know which it was.

28 Q. You slipped?

A. Slipped or was caught.

Q. What is the space between the clutch and the east wall of the building?

A. I don't believe I could tell you that.

Q. About how much?

A. I should think it was something over 4 feet, but there is no chance to go in there, you cannot get in between the clutch and the wall, you have got to go between the wall and the fly-wheel, there is 16 inches there.

Q. And were the oil cups that you were screwing up just before you were injured were on the back end of the pump?

A. Yes, the back side.

Q. And that is the side away from the door as you come into the house?

A. Yes, sir, that is what I thought that was the picture of it.

Q. Then as I understand it, figures "1" and "2" and "3" instead of being on the front of the pump as shown in this photograph should be the corresponding oil cups on the back of the pump towards the wall?

A. That is correct.

Q. And it was as you turned to come away from those oil cups on the back of the pump when you got your hand cut off?

A. Yes, sir.

Q. This hood that is over the crank-shaft opens towards the door, does it not?

A. Towards the cylinder, yes, sir.

29 Q. Now, you screwed up these hard oil cups and then you turned to your left?

A. You might call it to the left there, I was facing west, I turned to the south, I suppose that would be to the left.

Q. Then the engine would be on the south side of the pump house?

A. On the south side.

Q. And the pump would be on the north side of the pump house?

A. Yes, sir.

Q. After your hand was cut off, to get out of the pump house you went to the south and then around the fly-wheel, then west and came out of the door?

A. Yes, sir.

Q. That is the way you came out?

A. Yes, sir.

Q. When you started to go out after you had finished screwing up those oil cups you then turned to the left?

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. Your back would be towards the wall as you stood there screwing up the oil cups?

A. I stood with my face to the west.

Q. With your back to the wall?

A. Yes, sir.

Q. To come out, you turned?

A. Yes, turned with my face to the south.

Q. With your face towards the south?

30 A. Yes, sir.

Q. Before you had been hurt had you connected the engine with the pump?

A. No, sir, I did not connect it at all, I didn't have a chance to, if I had the pump would have been running when I oiled those cups, it wasn't running when I oiled those cups.

Q. You say that you slipped on the floor?

A. I say that I either slipped or my coat, by the suction from the fly-wheel, was drawn into the clutch, I don't know which, it was either one of the two.

Q. Did you slip on the floor, answer the question yes or no, if you can?

A. I cannot answer it "yes" or "no."

Q. After you had been injured and on the 8th day of June did you write a letter to the Great Northern Railway Co. explaining how the accident happened?

A. To Mr. Kimball.

Q. To Mr. Kimball, yes?

A. Yes, sir.

(Letter marked exhibit "1.")

Q. I show you exhibit "1," is that the letter that you wrote to Mr. Kimball?

A. Yes, sir.

Q. Where were you at the time you wrote this letter?

A. I was in the hospital.

Q. Were you alone at the time you wrote the letter?

A. Yes, sir.

31 Q. Did you mail the letter yourself?

A. I am not positive whether I did or not, I believe I gave the letter to Mr. Wheeler to mail it. It was mailed through the railroad mail, that is how it was mailed.

Q. In that letter you stated this: "I understand that you want some kind of a statement from me as to how the accident occurred by which I lost my right arm at the elbow?"

A. Yes, sir.

"Well there is nothing more that I can say than I have already stated and the accident is just as much of a mystery to me as to any one else for I am absolutely unable to tell just how it occurred. I will state however, that Dassel is usually a very busy station and on the day of the accident it was exceptionally so. At noon I tried to get time to go down and start the engine, but on account of my work was unable to do so, I will state for your information that the pump is more than half a mile from the station. At about 5:45 P. M. I got my work in shape so I could leave for a few minutes and so remarked to the helper that I would have to work 3 or 4 hours that evening to get my work up in shape so I would be able to get through the next day, which was not uncommon for me to do, and that I would run down and start the pump and let it run until I quit that evening, and in that way would have water enough in the tank to last over night. I went down and had just got it started and turned to come out of the house when I felt a jerk at my arm and noticed my coat was torn at the shoulder and then, for the first time,

32 discovered that my arm was gone. It was all done so quick and so sudden that I could not realize what had been done. I had done nothing different than I had done hundreds of times before, and ever since the accident I have been trying to figure out just how it was done but have been unable to do so.

As soon as I realized that my arm was gone I grabbed the stub with my left hand to stop the flow of blood and started for town and upon reaching the first house I had them telephone to Dr. Peterson to be in his office when I arrived. He was there and did what he could for me, prepared me to go to Litchfield in an auto, which place I reached about 7:45 P. M. where the doctors Peterson and Donovan found it necessary to amputate the arm at the elbow. I have since been at the Litchfield hospital. Litchfield, Minn., but expect to go to Dassel today as arm is about healed. I now expect to go to Minneapolis about Thursday of this week and will probably return the following Sunday or Monday to Dassel."

Q. That is the letter?

A. That is the letter, yes, sir.

Q. What you stated in that letter was true, was it not?

Plaintiff objects as calling for the conclusion of the witness. Objection overruled.

A. So far as I understood it at the time I wrote the letter, yes, sir.

Q. At the time you wrote the letter you wrote the letter
33 for the purpose of informing the Company as to how the accident happened?

A. As to what I knew at that time about how the accident happened.

Q. You wrote the letter at that time to inform the Company as to how you knew the accident happened?

A. As to how I knew the accident happened?

Q. Yes?

A. I don't get your idea.

Q. As you stated in that letter that was then as how you recollected the facts of the accident?

A. It was at that time.

Q. To the best of your ability?

A. To the best of my ability.

Q. How long after you wrote this letter was it that you left the hospital?

A. The same day.

Q. You did not return to the hospital again?

A. Not to that hospital, no, sir.

Q. You say the space between the back end of the clutch, or the east end of the clutch, or the east side of the clutch and the east wall is about 4 feet?

A. I should judge about that, I never measured that, I don't know exactly.

Q. What is the diameter of the clutch, approximately?

A. I should think about 10 or 12 inches, I am not sure about that either, I never measured it.

Q. What is the space between the oil cups and the east wall?

A. I don't know exactly, the stove stands between the
34 oil cups and the east wall.

Q. I refer to the hard oil cups on the pump?

A. Yes, I say the stove stands between the oil cups and the east wall. There is a space between the east wall and the pump.

Q. Were you, when you were screwing up those hard oil cups, were you standing between the stove and the pump?

A. Yes, sir.

Q. And what is the space between the stove and the hard oil cups, what space is there in there?

A. I don't know, I would not think it was over two feet, I would not testify I am not sure about that.

Q. But you say it was just as you turned around when the accident happened?

A. Yes, sir.

Q. Just as you turned around?

A. Just as I turned to leave.

Q. The only motion that you made was when you turned to leave?

A. I may have taken one step.

Q. Did you take one step?

A. I think I did.

Q. How far would you have stepped in that one step?

A. 2 feet or 2½ possibly, I don't know.
Q. You don't know whether you took a step or not?
A. Yes, I feel sure I did.
Q. Your coat could not have gotten caught there unless you had taken that step?
35 A. Yes, sir.
Q. You are now positive you took that step?
A. I am sure of it.
Q. Which hard oil cup did you turn up first, the one towards the north or south wall?
A. I cannot tell you.
Q. Did you turn up the middle hard oil cup before you turned up the other two?
A. Not likely so, possibly I might, but not likely to do that.
Q. What direction was the wind blowing that day?
A. I don't know.
Q. Were the windows open or closed?
A. Closed, and always were closed.
Q. What part of the shield did you take hold of?
A. I didn't take hold of any part.
Q. What part of the shield did you reach out to take hold of?
A. I reached out for the top of it.
Q. Did you fall forward on the shield?
A. Yes, I must have fallen forward.
Q. Did you?
A. Yes, sir.
Q. Do you know whether you did or not?
A. Yes, I do know that I did.
Q. What is the width of the shield at the bottom of the shield where it fits on to the engine?
A. I should think about 6 or 8 inches, I don't know exactly, I never measured it—you mean across the top of the shield I presume.
36 Q. No, at the bottom of the shield where it fits on to the engine?
Q. What is the width of the bottom of the shield?
A. It is the same width as it is at the top, exactly the same—it does not taper at all, just curved, an open space in front.
Q. Can you tell the jury approximately what the width of the shield is just where it fits on to the engine?
A. I should think 6 or 8 inches.
Q. And the width is the same all the way up?
A. Yes, sir.

(By the Court:)

GENTLEMEN OF THE JURY: This is a case that perhaps may interest you and it may be of considerable interest to outsiders. It is certainly of interest to the parties to the action. I want to call your attention to the injunction of secrecy contained in your oath not to say anything about the case among yourselves nor listen to any conversation concerning it. You cannot talk about this case among

yourselves, even if you are alone, until the case is given you in charge and that is not until you go into the jury room to deliberate upon a verdict. Be particular throughout the trial of this case to keep your own counsel strictly, say nothing to any person, or among yourselves, or listen to any conversation concerning it. If any person or persons should speak about the case in your presence, tell him or them, as the case may be, that you are on the jury
37 and ask them to desist. If they do not do so report the particular persons to the Court and the Court will deal with them accordingly.

Recess.

Cross-examination continued by Mr. JANES:

Q. What is the inside measurement of this pump house north and south?

A. It is about 11½ feet.

Q. That is within a few inches of being correct?

A. The outside measurement is 12 by 14.

Q. The inside measurement north and south you say would be about 11 feet and 6 inches?

A. The walls would come out of that, it might be a foot, may be not more than 11 feet, I never measured it.

Q. The pump, does that sit on a concrete base?

A. Yes, sir.

Q. Is that concrete base above the floor?

A. Partially.

Q. Does the engine rest on a concrete base?

A. Yes, sir.

Q. Is that above the level of the floor?

A. A little, yes sir.

Q. By a little you mean 2 or 3 inches?

A. Yes, sir, I suppose 2 or 3 inches.

Q. What is the distance between the north wall of the building and the edge of the pump nearest to the north wall?

A. The concrete is nearest to the north wall.

Q. I am getting at the floor measurements, take the bottom of the pump. Are not the casting underneath the pump—what would be the distance between the wall and the edge of the iron casting?
38 A. I cannot tell you.

Q. About what is it, within an inch or two?

A. I should think 2 feet and a half, I never measured it, I should judge, that is only guessing.

Q. What is the width of the alley, we will call it, between the pump and the engine?

A. You mean between the base of the pump and the base of the engine?

Q. Yes, that is what I mean?

A. I never measured, I would judge about 18 inches, that would be my best judgment.

Q. The clutch shown just below the letter "A" in the photograph,

is that round circular piece of iron there the clutch—the clutch did you state was 10 to 12 inches in diameter?

A. Yes, sir.

Q. There is a shaft that runs from this clutch connecting with the pump and engine?

A. Yes, sir.

Q. What is the length of that shaft between the pump and the engine?

A. That shaft runs through from the engine to the gearing of the pump through to the other side, do you want the full length of that or do you want the distance between the first bearing in the pump and the engine, that is a question I would like to know.

Q. Looking at the clutch here what is the distance between?

A. That would be the south side of the clutch and the shield of the pump, I should judge, if I understand your question right between the clutch and the crank shaft.

39 Q. No, between the clutch and the edge of the shield nearest the clutch? In other words, I want the length of that shaft that the set screw is in.

A. You want the total length of it?

Q. No, just between the clutch and the shield?

A. I didn't measure that, I should judge that it was about 18 inches, that is simply a guess, I don't really know what the distance is—it is not very far, I should judge about 18 or 20 inches, that would be my best judgment.

Q. The distance between the pump and the engine is about how much?

A. You mean the base of the engine and the base of the——

Q. Yes?

A. I should judge about the same distance.

Q. This clutch, this circular disc shown as "A" on this photograph is in about the centre, is it not, in that alley-way looking at the photograph here?

A. No, I think not—you mean about the centre between the pump and the crank-shaft—between this bearing here and this bearing here.

Q. Yes?

(Counsel for Defendant:) The bearings the witness refers to are on the shaft that goes through the clutch.

A. That is the bearing I have reference to, right there and right here.

Q. What is the distance between the two x-marks I have placed on exhibit "B" representing the location of the two bearings that you just spoke about?

40 A. I should judge about 30 inches.

Q. About 30 inches?

A. I should judge so.

Q. How wide, thick through, is the clutch case?

A. About 3 inches I think, I would not say, I am not certain.

Q. The crank shaft that goes to the clutch with the set-screw in

that has been referred to here, when it revolves this screw turns towards the east wall, does it not?

A. Yes, sir.

Q. That would be turning towards a man who is standing there?

A. Yes, sir.

Q. Revolving this way?

A. Yes, sir.

Q. Towards him?

A. Yes, sir.

Q. What is the distance between that set-screw and the shield or the solid casting of the engine. That is from the set-screw from the solid casting on the engine to the solid casting on that shaft?

A. I should think about 14 or 15 inches.

Q. What is the distance from the set-screw to the right hand letter "x" marked on exhibit "B?"

A. I don't think that is over 6 inches.

Q. What is the distance between the set-screw and the south side of the clutch case?

A. The distance is a little less on that side than it is on the other, just how much less I would not want to say.

Q. That being correct, if it is a little less the distance be-
41 tween the south side of the clutch case and the solid part of the engine or of the shield would be about 12 inches?

A. I don't know exactly how that would be, these measurements he is asking about now, I never took them.

Q. I am asking for your best judgment?

A. The answer I have given you is my best judgment as I can remember it, just remember the plant as it was.

Q. How did you start the pump, or how would the pump be started if you had started it—if you had started the pump, how would you have started the pump?

A. Throw the lever towards the engine.

Q. Where is that lever situated, showing you exhibit "C," which you say is a photograph of the engine as it now appears?

A. Here you can see the lever (indicating) right here.

(Counsel for Defendant:) Witness indicating lever on plaintiff's exhibit "C," the letter "x" being placed just above the lever.

Q. Will you locate the lever on the machine, whereabout on the machine is it, where is it located?

A. It is connected with the clutch.

Q. It is connected with the clutch case?

A. Yes, that is what I would call it.

Q. Connected with the clutch case?

A. Yes, sir.

Q. On which side of the clutch case is the lever?

42 A. On the north side, or in other words on the left side as you go in.

Q. Near the pump?,

A. Yes, sir.

Q. It is between the clutch case and the pump?

A. It is north of it, we might call it east of the clutch case.

Q. The lever is shown on exhibit "B," is that the lever that was on the engine at the time of the accident?

A. I could not tell you whether it is the same.

Q. Is it in the same place?

A. It is in the same place, yes, sir.

Q. What would you say the distance between the bottom of the lever where it fastens on to the clutch is to the set screw, approximately how many inches?

A. 3 or 4 inches, I should judge to the set screw next to the engine, from there over to there (indicating).

(Counsel for the defendant:) The set-screw referred to by the witness in his direct and cross-examination is shown on the photograph just under the letter "B" on exhibit "B."

Q. From the point where the handle fastens on to the clutch and the letter "B," the set-screw, what is the distance?

A. I should think about 10 or 12 inches.

Q. Now this handle that I refer to that you say you throw over to the pump, will you describe it to the jury?

A. It was simply a straight piece of iron about 2 inches
43 wide and probably a quarter of an inch thick and about 2 feet and a half or possibly 3 feet long running down to the north side of the clutch, or to the *elft* side as we enter the building.

Q. Did that handle stand perpendicular?

A. No.

Q. Which way did it lean?

A. It had an angle to it towards the door.

Q. Would the top of this handle be on the north side of the clutch?

A. No, sir, I rather think, the way that stood at least at this time that it would have fallen on the south side.

Q. How much?

A. Not very much, probably not but a little.

Q. If that lever handle had been at all times perfectly straight it would have dropped possibly just opposite the clutch—this handle was bent a little?

A. Yes, it had become bent once or twice, I would like to make a statement there—that picture was taken some time ago, that is not the handle that was on there when the accident happened.

Q. The handle, as I understand it, that was on the machine at the time you got hurt was an handle similar?

A. Yes, it may have been the very same handle, but fixed in a little different shape.

Q. This fly-wheel that is on the south side of the engine is, I believe 6 feet in diameter?

A. About that.

Q. How high is the fly-wheel above the floor?

44 A. About 2 inches.

Q. What is the height of the shaft that runs through the clutch between the points "x" and "B" on the photograph, above the floor?

A. The shaft above the floor where it goes through clutch casing?

Q. Yes?

A. Probably a little more than 3 feet, I cannot state that distance exactly, it cannot be over 32 or 33 inches.

Q. And the set-screw, when the screw was on top of the shaft, of course, would be the same distance from the floor?

A. Yes, you must bear in mind there was more than one set-screw, there was 3 set screws on the shaft that goes through the clutch here.

Q. What was the size of those set-screws?

A. The set screws were square on top.

Q. Do you know the size where it went into the hole, or the size of the screw?

Q. The size of the square part first?

A. I should think it was a little more than half an inch square.

Q. How much would the set-screw project above the casting?

A. Fully two inches.

Q. Those set-screws had been in that shape during all of the years you had worked there?

A. Yes, sir.

Q. Of course you knew their position?

A. Yes, sir.

Q. Knew where they were located on the shaft?

45 A. I did, yes, sir.

Q. Is the casting on the bottom of the pump and on the engine in line north and south on the east end?

A. You mean the base of the pump and the base of the engine on a line with each other?

Q. Yes?

A. The base of the pump runs one way and the base of the engine the other.

Q. I mean the back or rear base of the engine and pump towards the east wall?

A. On the east end of the engine and the east side of the pump, if a line was drawn there would it be exactly alike you mean?

Q. Yes?

A. No, sir, it would not.

Q. Which is nearer the east wall, the bed of the engine or the bed of the pump?

A. The bed of the engine.

Q. How much does the bed of the pump extend beyond the shaft that runs through the clutch towards the east? From the point "x" on the shaft that runs through the clutch what is the distance from that point to the extreme edge of the pump?

A. My recollection of that is that that point there that you have asked about would be exactly over it, I don't believe it would be beyond it, I don't believe the base would be beyond it, that is east of it. I rather think it is further north. If you drop a line down from that mark "x" to the floor I rather think it would possibly just strike the edge of the base, that is my best recollection of it.

46 Q. Then if you stood behind the pump and looked towards the south wall the clutch casing would extend beyond the east line of the pump, would it not?

A. Not very much, possibly a little, I would not say.

Q. If the clutch casing is 10 or 12 inches in diameter and if you drop a line from the point "x," which you say would fall to the east edge of the pump, then the clutch casing would extend 5 or 6 inches beyond that toward the east wall?

A. That twelve inches that I spoke of here, you cannot count that more than half of that because the shaft runs through that, I should think it would be very nearly in a line.

Q. Then the top of the clutch casing would be about 3 feet and 8 inches from the floor?

A. Yes, it would be something about.

Q. If it was 32 inches from the shaft to the floor, if the clutch casing was 12 inches in diameter, it would be about 38 inches?

A. Yes, sir.

Q. When you turned around as you state you did, what were you going to do, if anything?

A. I was going to go around the fly-wheel to the front of the engine.

Q. What were you going to do in front of the engine?

A. I was simply going to throw the lever and start the pump, as I started it and to go out of the door is the last thing I always did.

Q. Where would you have stood when you started the pump?

47 A. I would have stood in the alley-way here you spoke of.

Q. I think you said yesterday when you started the pump, you started the pump when you stood along the east wall? I will ask you if you did not testify yesterday that it was your custom when you started the pump that you stood beyond the clutch, that is east of the clutch?

A. No, sir, I did not make any such statement.

Q. Then to start that pump you walked down the alley-way that we have referred to, you would have, from the position that it was back of the engine, to walk around the fly-wheel to the front of the engine, around the front of the engine to this alley-way, the lever standing over that?

A. As I went out I didn't necessarily have to step in there, throw the lever and walk out the door.

Q. You can start the pump when you are standing behind the clutch, though?

A. I don't believe I can.

Q. There is no reason why you could not throw the clutch as well behind as in front of it?

A. Yes, there is.

Q. What is the reason?

A. Because you would have to reach clear over the shaft to get to the lever, in that way you would certainly come in contact with the clutch.

Q. And with the set-screws?

A. I don't believe you could start it without getting caught in that way, I never understood to do that.

48 Q. When was it that you put the oil in the cup shown in figure "4" on Exhibit "B?"

A. That is what you refer to here?

Q. Yes?

A. I put the oil in that cup before starting the engine, I invariably do that.

Q. And cup "5," where you put the oil, it was necessary for you to reach over the top of the shield, was it not?

A. No, sir, not necessarily.

Q. When you put the oil in cup "5," how did you get oil in cup "5?"

A. Just the same as I did oil in cup "4."

Q. Did you have to reach over the top of the shield?

A. No.

Q. Or reach around the shield?

A. I reached around the shield.

Q. You reached around the shield and put the oil in cup "4?"

A. Yes, sir.

Q. You say that you felt a tugging at your coat?

A. Yes, sir.

Q. A little tugging at your coat?

A. Quite a considerable.

Q. Whereabouts was it on your coat?

A. On the bottom, I could not tell whether it was right there, (indicating) or right back here somewhere.

Q. You should judge it was on the bottom of your coat?

49 A. I should judge along on the side, right here (indicating).

Q. What kind of a coat did you have on the day?

A. I had on a blue serge coat.

Q. The same cut and style as that one?

A. Very similar to it.

Q. Was it any longer than that coat?

A. I should judge about the same length, I cannot say exactly about that.

Q. Will you stand up?

Agreed between counsel that the coat the witness wears is 29 inches from the collar to the bottom of the coat.

Q. How did you say this accident happened?

A. I said——

Q. Starting when you turned around?

A. When I turned around to leave this point in behind the engine, I either slipped or the suction of the fly-wheel, the wind from that blew my coat into it.

Q. That you either slipped or the suction of the fly-wheel blew your coat in on to the set-screw?

A. Yes, sir.

Q. And when this happened, either one or the other, was when you threw out your hand?

A. No, not just at that time.
Q. Just as quick as you could, I presume?
A. It was all done so quick it is pretty hard to tell what motions I did go through.
Q. But you did throw out your hand?
A. Yes, I did.
50 Q. That was when you was pulled what way?
A. That was when I was being pulled towards the clutch or shaft, as you might call it.
Q. Towards the clutch?
A. Yes, I was being pulled in this position (indicating), I felt that I was unable to catch myself.
Q. Did you fall on the shield, or strike the shield?
A. I cannot say that I did.
Q. Did you not testify yesterday that you fell on the shield?
A. No, sir, I did not, I threw my hand out to place it on the shield and missed it.
Q. Did you not testify yesterday that you fell forward on to the shield?
A. No, sir.

By the Court:

Q. The shield you have reference to is the shield of the crank-shaft?
(Counsel for Defendant:) Yes, sir.
Q. Was this pump house kept locked?
A. Yes, sir.
Q. Who had the key to the pump house?
A. We had a spring lock on it that we had used for a number of years, we didn't have any key.
Q. Where were you standing when you turned around and just before you took that step which you said took you about 2 feet or 2½ feet? Where were you standing then, as you turned around?
A. Just on the east side of the pump, of the triple pump, of the 3 pumps.
Q. Which would have brought you in line with what we have called here grease-cup No. 3 on the pump?

—. —— ——.

51 Q. Grease cups Numbers 1, 2, 3, shown on Exhibit "B," instead of being shown on the front side of the pump are directly opposite on the back side of the pump? Just as you turned around and made that step which you said took you 2 or 2½ feet where were you standing in relation to the 3rd grease-cup?
A. I was away from it.
Q. Whereabouts, in line with it?
A. No.
Q. Where?
A. I must have been back in line with the clutch.
Q. But just before you took the step and at the time that you turned around you were in line with the back of the clutch shown on Exhibit "B" under the letter "A," is that correct?

A. When I took the step that brought me into that position opposite the clutch or about opposite the clutch.

Q. I asked you as you took the step, before you took the step?

A. Before I took the step?

Q. Just before you took the step where were you standing?

A. I was standing then probably about opposite oil cup No. 2, that would be my best judgment, before I took the step.

Q. Every time that you went down to start the engine, start the pump, would you go in behind the pump and engine and look after the oiling as you did this time?

52 A. Yes, I always did.

Q. That was your common practice?

A. Yes. sir.

(Counsel for Defendant:) Figures "1" and "2" on Exhibit "B" are to represent the line of the top of the iron casting forming the north side of the bed of the crank-shaft. (The figures "1" and "2" referred to are both on the right of the picture.)

Q. How high is the top of the shield, the top edge of the shield from the line between the figures "1" and "2?"

A. You mean how high from that point down to this point?

Q. Down to this line here?

A. I should say about 6 inches.

Q. The letter "x" is put on the outer edge of the top of the shield, the letter "y" is supposed to be directly beneath the letter "x" in a direct line?

A. Yes, sir.

Q. And the figure "1" is supposed to be the extreme east end of the top of the bed casting, I want to know what the distance is between the figure "1" and the letter "y?"

A. That would be between the east end of the engine and the point directly below the top of the west edge of the hood?

Q. That is right?

A. I should say about 12 or 14 inches, those measurements I have never taken.

Q. Does this hood commence at the extreme east edge of the top of the bed casting?

A. Yes, that is my remembrance of it.

53 Q. How wide did you testify that the top of the hood was?

A. I think 6 or 8 inches.

Q. You say that it would have been practicable to have put a hood on top there that was longer than the hood that was on the engine at that time?

A. Yes, sir.

Q. By being practicable you mean that it was possible for a man who was a mechanic to have constructed a hood of material like that?

A. Yes, sir.

Q. How long do you say that hood should have been?

A. I think I made the statement that it might have extended to

the end of the cylinder, I have made that statement, I don't remember whether I made it here on the stand.

Q. It could have been made to extend over to the end of the cylinder?

A. Yes, sir.

Q. And that is what you said it was practical and possible to do?

A. Yes, sir.

Q. When you said rubber caps could be put on these set-screws you mean it was practicable and possible to have put rubber caps on the set-screws?

A. Some of you suggested that here yesterday. I did not make that statement.

Q. Where were you going to put the rubber caps?

A. That is where I would have put them.

Q. You were going to put rubber caps on the set-screws?

54 A. Yes, put a rubber band as it were, right around them.

Redirect examination.

By Mr. Davis:

Q. You stated yesterday on cross-examination you had charge of the pump house and pump. I will ask you if you had anything to do with the repairing the engine and pump?

A. No, sir.

Q. I will ask you if you had anything to do with fixing any screws or anything else on the pump?

A. No.

Q. I will ask you if you had anything to do with any repairs, when any repairs had to be made on the pump whether you did those or some one else?

A. Some one else.

Q. Who was that?

A. Mr. Bogen. Paul Bogen.

Q. When you stated you had charge of the pump house did you mean to state by that you had charge of the repair and fixing of the engine or running the engine?

A. Simply running the engine, nothing to do with the repairs.

Q. In your letter which you wrote to the Company that Mr. Janes examined you regarding, I notice you state in that: "Well there is nothing more that I can say than I have already stated," had you made another statement to the Company?

55 A. I had, yes, sir.

Q. Was that the 245?

A. That was the 245.

Q. In that had you stated some of the conditions of the accident?

A. Yes, sir.

Q. What did you tell them?

Defendant objects as hearsay.

(Report produced by defendant's counsel.)

Q. Is this the 245 you signed?

A. Yes, sir.

(Report marked exhibit "E" and offered in evidence by plaintiff.)
Received without objection.

Q. You speak here and I believe also in your 245. In this letter you state: "I am absolutely unable to tell just how it occurred," what do you mean by that?

Defendant objects as calling for the conclusion of the witness.

Q. I will ask you if it was made immediately, the 245, when was it made?

A. The date of it, I think was on there, I don't remember the date. It must have been written about the 20th or so of May, but I am not sure of the date.

Q. At the time that you made the 245 and also wrote the letter of June 8th did you know at the time you wrote it that your arm was caught in the cylinder?

Defendant objects as leading, calling for the conclusion of the witness, the witness has already stated what he knew about the accident.

56 By the Court: I think he has fully stated.

Q. I am asking this witness if he, at the time he wrote the letter of June 8th if he knew his arm was caught in the crank-shaft.

Defendant makes the same objection.
Objection overruled.

A. Yes, sir.

Q. I will ask you what you meant by stating it was a mystery to you?

Defendant objects as calling for an opinion or conclusion of the witness.
Objection sustained.

Q. Did you know at that time that you reached out to protect yourself?

Defendant objects as leading, the witness has already answered the question and testified as to how the accident happened, this statement was made 4 weeks after the accident happened.
Objection sustained and plaintiff excepts.

Q. In these measurements which you have testified regarding, or these distances, I will ask you whether you made any of these measurements?

A. No.

Q. You are not certain as to the distances?

A. No.

Q. You have not seen the engine since it has been removed from the pump house?

A. No.

Q. You don't know where it is?

A. No.

Q. You never made any measurements of the engine?
57 A. I measured the distance between the south wall and the fly-wheel.
Q. That is the only measurement you made?
A. The only measurement of the house.
Q. The rest of the measurements you testified regarding are simply your guess?
A. Yes, sir.

By the Court:

Q. He has testified before it was his best judgment.
A. Yes, sir.

By the Court:

Q. That is what you mean by saying it is a guess?
A. Yes, sir.
Q. (Showing witness.) Is this the coat you had on that day?
A. That is part of it.
Q. I will ask you to state what you did with this coat the day you were hurt?
A. The coat was brought up from the engine house soon after I was hurt, I don't just know how soon after.
Q. Has it been in your possession at your house since that time?
A. Yes, sir.
Q. Do you know where it was from the time of the accident down to the time it was brought up?
A. No, I don't, I know it was down to the engine house, but what part of the house I don't know.

—. ——.

A. I will positively swear the coat is in the same condition it was when it was brought to my home.
58 Q. In throwing this lever that you start the pump with, how long is that lever?
A. About 2½ or 3 feet.
Q. Where do you take hold of the lever, how far away, how many feet away from the clutch?
A. Must be 3 or 4 feet away.
Q. From the clutch or set-screw?
A. Yes. That lever is put on there, one of the reasons is to get away from it.
Q. I will ask you whether or not this contrivance appearing here for oil was on there at the time of your injury?
A. This was not on there when I was hurt, that oil cup was not on the top.
Q. Where was it? I have made a circle at the right hand side of exhibit "B." I will ask you if that oil cup which is near to that circle was in that position at the time you were hurt?
A. No, sir.
Q. Where was it?
A. There was an oil cup there similar to it placed upon the bearing of the crank-shaft.

Q. I will make a letter "B" where the oil cup was at the time of your accident if you will point it out?
A. Where this business there is.

Recross-examination.

By Mr. Janes:

Q. You say that you have been unable to do any work since?
A. Yes, sir.
59 Q. You cannot on account of the loss of your arm, you cannot do any station work?
A. No.
Q. You could have had your station back at Dassel, that was offered to you wasn't it?
A. Yes, sir.
Q. And also a helper or two?
A. I don't remember whether they said anything about a helper, but I presume there would be.

(By Mr. Davis:)

Q. How long were you sure you could hold your job after you got it back?
A. I was not sure of a day.
Q. Were you offered anything else besides that job at Dassel?
A. Yes, sir.

(Recess.)

Mr. McGRAW, called in behalf of plaintiff, was duly sworn, examined by Mr. Davis and testified as follows:

Q. You live in Dassel?
A. Yes, sir.
Q. You lived there some years?
A. Yes, sir.
Q. Are you acquainted with the plaintiff?
A. I am.
Q. You were down to the pump house shortly after this accident?
A. I was.
Q. How long after the accident?
A. About 2 hours I think.
Q. Where was the coat of Mr. Knapp's when you got down there?
60 A. Part of the coat was on the machinery.
Q. What part?
A. I suppose what they call the crank-shaft.
Q. Did you unwind part of it?
A. No, the party that was with me pretty well loosened it so I could pull it out.
Q. Did you pull it out from the crank-shaft?
A. Yes, I think it was the crank-shaft, I am not positive of the machinery.

Q. Calling your attention to exhibit "D" was it at the point of "A"?
A. I think it was about that point.
Q. I have now made the letter "A" in ink, that is the position as you found it?
A. I think so.

Cross-examination.

By Mr. Janes:

Q. What was done with this part of the coat that you took out of the machine, what did you do with it?
A. I don't remember what was done with it. I think the part I got I left there, I was after a package of money that was in the coat.
—. You are in the banking business?
A. Yes, sir, what was done with the part of the coat, I think it was left there.
Q. Was part of the coat thrown out doors outside of the pump house?
A. The way I remember it, it was left in the pump house, I am not positive as to that.
Q. What part of the coat did you unwind from the ma-
61 chine, pull away from the machine?
A. About half the coat, including the shoulder I think, part of the sleeve.
Q. And the coat was wrapped around the machinery at the point near the place where the letter "A" appears on exhibit "D?"
A. I think so.

GUST SCHELINE, called in behalf of plaintiff, was duly sworn, examined by Mr. Davis and testified as follows:

Q. Where do you live?
A. Litchfield.
Q. What is your business?
A. Automobiles.
Q. Have you ever had occasion to work around gasoline engines of different makes, different horse-powers?
A. Approximately 3 or 4 years.
Q. During that time have you had occasion to observe the method of guarding them?
A. Yes, sir.
Q. Are you acquainted with the engine located at Dassel, that was located at Dassel, the Great Northern pump house there?
A. Yes.
Q. Calling your attention to exhibit "D" I will ask you if the picture of the engine so far as the crank-shaft and hood there appears about as it was previous to the accident?
A. Exactly as it was when I saw it last.

Q. From your experience in working around gasoline en-
62 gines, I will ask you whether you can state to the jury whether or not it would have been practicable to have a hood over the crank-shaft?

A. Yes, sir.

Q. Would it have been practicable or not?

A. Yes.

Plaintiff objects, no foundation has been laid.

Q. During the time you have worked on gasoline engines have you had occasion to observe the different guards?

A. Yes, sir.

Q. Have you had occasion to fix guards on gasoline engines?

A. No.

Q. And the guards you have seen, is there any difference between them and the one here in evidence?

Defendant objects, because no foundation is laid, there might be different engines used under different circumstances and conditions.

Q. Taking into consideration a stationary gasoline engine of 8 to 12 horse power, you have had occasion to work around them, repair them, I presume, in the last 4 years?

A. Yes, sir.

Q. About how many?

A. Half a dozen at least.

Q. In working around them you have occasion to notice the guards, the method of guarding them?

A. Yes, sir.

Q. From your experience in repairing them and from your observance of those engines and of this particular engine I will
63 ask you to state whether or not it would have been practicable to have guarded by putting a hood over this engine other than was there?

Defendant objects on the ground there is no foundation laid.

Objection sustained.

Q. Have you had occasion to work around similar engines to this one?

A. Yes, sir.

Q. Used for a similar purpose or for different purposes?

A. Both.

Q. So far as the guard is concerned I will ask you whether that would make any difference?

A. It would not make any difference.

Q. You have worked around numbers of them that are not stationary as well as stationary ones?

A. Yes, sir.

Q. I will ask you whether or not in your opinion, it would have been practicable to have guarded this cylinder and crank-shaft?

A. Yes, sir.

Q. Tell the jury in what way. Tell the jury in what way it could

have been practically guarded from this side down there (indicating), down there and show them?

A. First by making an extension of the so-called projection over the counter-balance or crank-shaft extending back to the cylinder next by putting some kind of a guard on each side, covering up each side of the counter-balance by little bolts fastened to the base of the engine.

64 Q. The counter-balance is part of the crank-shaft?

A. Part of the crank, yes.

Q. Calling your attention to exhibit "C" to a bolt protruding out on the clutch marked with the letter "*x*" directly above it, I will ask you whether or not, from your experience in working around machinery, whether or not it would have been practicable to have guarded that bolt?

Defendant objects on the ground no foundation is laid.

Objection sustained and plaintiff excepts.

A. Yes, sir.

Q. In what way? You have worked around machinery for a long time?

A. Yes, sir.

Q. And have had occasion to observe how set-screws are guarded where they project, say 2 inches?

A. Yes, sir

Q. As a rule do set-screws project that far out, 2 inches?

A. No.

Q. Where they do, what has been your experience and observation as to how they are protected—wherever you have had occasion to notice how they are protected—are you able to state whether or not there is a practicable way, from your experience as a machinist, of protecting set-screws?

A. Yes, sir.

Q. You may state to the jury what that would be?

65 A. In that particular case?

Defendant objects on the ground no foundation has been laid.

Objection sustained, plaintiff excepts.

Q. You know this machine, you have observed this machine here in question?

A. Yes, sir.

Q. Are you able to state whether or not, from your experience as a machinist working around gasoline engines and around set-screws on different machines, are you able to state whether or not there was a practicable way of having guarded that set-screw on this particular machine?

A. Yes, sir.

Q. Will you state to the jury what would have been a practicable way to have guarded it?

Defendant objects on the ground no foundation has been laid.

Objection overruled.

A. State this to the jury?

Q. Yes, state that to the jury.

A. A very simple way which we could have covered this, this could be covered up by putting a small piece of belting around it and wired it on each side, and a more practicable way would be to have molded a rubber collar and put around with a steel band, which would be positively secure.

Q. Have you had occasion to see such guards at different times prepared in that way?

A. I have covered them that way myself.

Q. In your experience as a machinist?

A. Yes, sir.

66 Q. I will ask you if, from your experience whether these rubbers or protections you have spoken of would in any way affect or interfere with the running of the machinery at all?

A. No, sir.

Cross-examination.

By Mr. Janes:

Q. How many times have you been in the pump house down there at Dassel?

A. I could not tell you.

Q. When were you there?

A. A number of years ago.

Q. How many years ago?

A. 6 or 7 years ago.

Q. How did you happen to go there at that time?

A. With the man who was operating the machine.

Q. Who?

A. Roy Doty.

Q. What was he doing at the time?

A. Working.

Q. What capacity was he working in—for the Great Northern?

A. Yes, sir.

Q. In what capacity?

A. Helper in the station.

Q. He was helper in the station, a young boy?

A. Yes, sir, second man.

Q. And that was the only time that you were ever in the pumping station there?

67 A. No, sir.

Q. How long were you there at that time?

A. In the pumping station?

Q. Yes?

A. At what particular time?

Q. At the time you went there with Roy Doty?

A. Possibly was there 25 times.

Q. The last time you say you were there was 6 or 7 years ago?

A. Yes, sir.

Q. What month was it you were there 6 or 7 years ago?

A. I could not tell you.

Q. When was the first time that you went there, how many years ago?
A. I could not tell you that.
Q. Who did you go there with?
A. The same man.
Q. Was it the same year?
A. I think so.
Q. Where were you living at that time?
A. Dassel.
Q. What was your business at that time?
A. The drill business.
Q. You were not a machinist at that time?
A. I consider I was.
Q. When did you go into the automobile business?
A. A little less than 4 years ago.
Q. Before you went into the automobile business how many years had you been in the drill business?
68 A. 10 years.
Q. You had not had much to do with gasoline engines before you went into the drill business?
A. Previous to that?
Q. 14 years ago what were you doing with gasoline engines?
A. A little of everything.
Q. Where were you working with them? Where did you work them until 14 years ago?
A. The implement business.
Q. How large was this shield that was on the engine down there at the time you saw it?
A. I don't believe that I could tell you.
Q. How many set-screws were there on the shaft at the time you were there?
A. On what shaft?
Q. Those set-screws that you just told the jury could have been covered with rubber?
A. I don't think there was but one on that particular shaft.
Q. That is what we are talking about, that particular shaft? You say that this engine was of the same construction of a number of gasoline engines you have seen?
A. On the same order.
Q. Where have you seen an engine like this one, tell the jury one place?
A. One very similar to this.
Q. Where?
A. In the Town of Greenleaf, this County.
Q. Whose engine is it?
A. Aaron E. Anderson.
69 Q. How long has he had it?
A. A year or more.
Q. What was he using it for?
A. Various things.
Q. Pumping water?

A. Shelling corn.
Q. Was it used to pump water with?
A. I don't think so.
Q. You say the engine was of similar design to this?
A. It was a portable engine.
Q. In other words it was a gasoline engine and this was a gasoline engine?
A. Similar in size and construction.
Q. How large were the set-screws in this engine Mr. Anderson had?
A. It did not have set-screws like it. This particular set-screw you had on this wasn't connected with the engine.
Q. Was there any set-screws on Mr. Anderson's engine?
A. Undoubtedly there was.
Q. Where did you see an engine with set-screws similar to the set-screws on this engine—the set-screws you would cover with a rubber band I am talking about?
A. I have not seen any other one.
Q. You have not seen any other one?
A. Not any other one. Not with similar set-screws.
Q. How large were those set-screws?
A. On this one here?
70 Q. Yes?
A. You mean the length or size?
Q. I want you to describe to the jury the size of the set-screws?
A. That would be impossible for me to do.
Q. How large were the set-screws on top?
A. On what top?
Q. On top of the set-screws—the head of the set-screws?
A. I never saw a set-screw unless it was square.
Q. Were these square?
A. I think so.
Q. Do you remember whether they were square or not?
A. No, sir.
Q. How large a square was the head of the set-screw?
A. That depends on the size of the screw.
Q. I am asking you how large the head of the set-screws were?
A. I told you before I had not seen it.
Q. You did not see this set-screw?
A. I saw the set-screw, but I could not tell you the size of it.
Q. Do you know how high it projected above the shaft?
A. I could not say; from the looks of the photograph of it, an inch and a half.
Q. From the looks of the photograph?
A. Yes.
Q. You cannot tell distance from the looks of a photograph, can you?
71 A. Comparing that with the size of the engine, yes, sir.
Q. What would you say the length of the shaft was?

Plaintiff objects as not proper cross-examination.
Objection overruled and plaintiff excepts.

Q. Between the crank casing and the casting just to the left of the set-screw?

A. By the looks of it there, it might be 4 inches.

Q. You mean between the *color* of the box and the crank-shaft, is that what you mean?

A. Yes, sir.

Q. And that is the way you judge of the length of the set-screw to be an inch and a half?

A. About that, yes, sir.

Q. I believe the testimony shows that distance in there was 12 or 18 inches?

A. Might be.

Plaintiff rests.

It is agreed that exhibits "A," "B," "C," "D," "E," and "1" be considered in evidence.

At this time the defendant moves that the action be dismissed for the reason that the plaintiff has wholly failed to prove the allegations of the complaint.

And for the further reason that it appears from plaintiff's testimony that the accident occurred by him slipping and throwing out his hand or his coat was caught and pulled him forward.

72 That a verdict based upon this testimony would be a matter of mere conjecture for the reason that if the accident was due to the plaintiff slipping it is clearly a risk that he assumed and the plaintiff cannot recover if the accident was due to slipping as he says it may have been caused by.

And for the further reason that, assuming that the accident was caused in either of the ways in which the plaintiff testified that it was caused that the condition that occasioned the same was a risk which he had assumed as a part of his employment.

Motion denied and defendant excepts.

The defendant moves that the Court instruct the jury to return a verdict for the defendant for the reason that the plaintiff has wholly failed to prove the allegations of his complaint and wholly failed to prove negligence on the part of the defendant;

And for the further reason that it conclusively appears from the testimony that the accident was caused and occasioned by risks which the plaintiff assumed as part of his employment;

And for the further reason that any verdict in this case would be based upon mere conjecture or speculation, as the plaintiff has wholly failed to prove what caused the accident.

Motion denied and defendant excepts.

It is stipulated that on or about the 12th or 15th of June the plaintiff went to the engine house in question and examined the premises where he was injured.

73 It is also stipulated that the hood covering a portion of the crank-shaft at the rear of said engine was securely fastened

and that it is substantially 2 feet and 6 inches in length from the base of the hood, measuring in a circular direction on the edge of the hood.

It is stipulated that exhibit "2" is substantially a reproduction of the hood covering a portion of the crank-shaft.

It is stipulated that at the time Mr. Knapp visited the pump house or on about June 12th to 15th, that the engine upon which he was injured was still there.

And that exhibit "3" is substantially the size of the clutch.

During the argument of the case to the jury by plaintiff's counsel, counsel for defendant took the following exceptions:

Defendant excepts to counsel's statement to the jury that "Mr. Knapp came to me and told me the same story he told on the witness stand."

Also to counsel's statement in which he stated the measure of damages is plaintiff's earning capacity, that the earning capacity of plaintiff was $1,200 to $1,500 a year and that for 10 years his earning capacity would be $12,000 to $15,000, as that is not a correct statement of the measure of damages.

74 *Charge.*

GENTLEMEN OF THE JURY: The plaintiff brings this action to recover damages from the defendant for an injury sustained in the loss of his right arm at the elbow while he was in the employ of the defendant as its station agent at Dassel, this county, and while engaged about his duties as such agent on May 12th this year, in operating or in setting in motion a gasoline engine and pump, at the defendant's pump house at Dassel, for the pumping of water for the tank located at that place and there maintained for the purpose of supplying the defendant's locomotives with water as it might be required. The plaintiff claims that while so engaged he either slipped or his coat was in some way caught by the machinery then in motion so he was thereby drawn or pulled towards the clutch or shaft and that he reached out or extended his right hand or arm towards the shield or the crank shaft and in such way that it was caught in the crank shaft, causing the injury complained of. He further claims that the crank shaft was not properly guarded; that it was practicable and feasible to so guard the crank shaft or so to shield it as to protect the plaintiff from danger or injury; that defendant was negligent in failing to provide such guard or shield and that plaintiff sustained the injury complained of in consequence of such negligence. And the alleged failure on the part of the defendant to guard the crank shaft of the engine and also to provide a cap for a set screw or
75 screws is the only negligence charged against the defendant.

The defendant claims that the engine or machinery which, of course, includes the crank shaft, was guarded and protected as far as it was practicable and customary to guard and protect it, and still permit its proper use for the purpose for which it was intended. And the defendant further claims that the plaintiff was

an old and experienced employee who had operated the engine and machinery in the same condition for many years and that the crank shaft of the engine had been guarded or protected during all that time in the same manner as it was at the time of the accident; that he knew and appreciated all the dangers attending the operation of it in that condition and that he himself assumed the risk of injury from its use protected and shielded in the manner it was.

If the crank shaft of the engine in question was not properly protected in particulars charged and it was dangerous to the operator to operate it in that condition, and the hood covering the crank shaft was not sufficient to protect a person operating the engine from injury such as here charged, and if it was reasonably practicable and feasible to guard the engine so as to protect the one operating it from injury without interfering with its operation for the purpose for which it was used and that it was dangerous to operate it in the condition it was in it was the defendant's duty to so guard it, for it was incumbent upon the defen*ad*nt to furnish the plaintiff with reasonably safe machinery and a safe place to work.

76 If, after considering all the evidence in the case you are satisfied that plaintiff has established by a fair preponderance of the evidence that it was reasonably practicable and feasible to guard and protect the crank shaft of this engine and the screws spoken of in the evidence so as to prevent danger to the plaintiff without interfering with the proper operation of the engine for the purposes for which it was used; that the defendant failed to so guard and protect the crank shaft; that plaintiff sustained the injury by reason of the fact that the crank shaft was not guarded and protected, and you also find that the plaintiff did not assume the risk incident to operating the engine in its then condition, the plaintiff is entitled to recover.

It is the law that a person who undertakes any employment assumes all the risks incident to that employment which are open, obvious and discoverable by ordinary observation, and this applies to the place where the work is performed as well as to the machinery.

It appears that the plaintiff was an old and experienced employee of the defendant, that he had operated the engine and had entire control of its operation and the machinery connected therewith for about nine years continuously during which time it had been in daily operation and in the same condition in which it was at the time of the accident, and he was bound to know and appreciate all the dangers attending the operation of the engine in the place where it was located and in the condition in which it was as he

77 operated it, which an ordinarily prudent man possessed of ordinary intelligence and common sense and having the knowledge and experience of the plaintiff would know and appreciate, and if he sustained his injury in consequence of being exposed to a danger which he knew and appreciated or from his knowledge, experience and observation ought to have known and appreciated, he assumed the risk of such an injury and is not entitled to recover even if the defendant was negligent in failing to

guard the crank shaft and screws in any other manner than it was and *as* here made to appear by the evidence.

A corporation necessarily acts by and through its agents and servants, and, as stated, the plaintiff was and for many years had been the defendant's agent at Dassel, and, so far as appears, in full charge of all the machinery in question and has full knownedge of its condition, and that he gave the same his personal attention, on the average once daily for about nine years, and during all that time the engine—the crank shaft and the set-screws—remained in the same condition with respect to guards that it was in at the time of the accident, and he never at any time or in any way notified or informed the defendant or any of its officers or employees that its condition was in any way dangerous. If then you find that under the circumstances here made to appear the plaintiff understood and appreciated the risks incident to the operation of the engine in that condition and made no complaint to the defendant that the crank shaft and screws were imperfectly guarded, and if you
78 further find that such imperfect guarding of the crank shaft and bolt resulted in the injury complained of, still he cannot recover and your verdict must be for the defendant.

The defendant was required to exercise ordinary or reasonable care under the circumstances and it was not required to use the highest or extraordinary care and caution.

The burden is upon the plaintiff to show to your satisfaction by a fair preponderance of the evidence that the defendant was negligent or careless in the particular here charged, and the burden is upon the defendant to show by a fair preponderance of the evidence that the plaintiff assumed the risk incident to his employment.

This action i predicated upon a charge of negligence, hence consider and find first from the evidence whether the defendant has in any manner been shown to be negligent or careless in the respect here charged, and if on consideration of the question you conclude that it was not negligent or careless, that ends the case and the defendant is entitled to your verdict, but if on such consideration you find the defendant was negligent in the respect charged, you come to the next question, and that is the question of assumption of risk. If on this question you shall find that plaintiff assumed the risk incident to his employment that would end the case and defendant is entitled to a verdict, but if you find that there was no assumption of risk and you have also found that defendant was guilty of negligence plaintiff is entitled to recover and you
79 then come to consider the last question in the case and that is the question of damages and you will allow and assess such sum as damages as you think from the evidence he is fairly entitled to as compensation for the injury he has sustained. In determining the amount to which he would be entitled as such compensation, you can take into consideration the nature, extent and permanence of the injury sustained, his diminished earning capacity, if any, the extent of the pain and suffering he has endured, and any and all other matters, facts and circumstances shown by the evidence that will assist you in determining what the proper measure

of compensation should be. And as bearing upon this question of damages I charge you that if you shall find from the evidence that the defendant was guilty of negligence in the respect here charged by the plaintiff, and you shall further find from the evidence that the plaintiff was also guilty of negligence which contributed to the accident, that is that the accident was directly caused partly by the plaintiff's own negligence and partly by the negligence of the defendant, and you shall find that the plaintiff did not assume the risk incident to his employment, the verdict will be for the plaintiff, but you will in that case offset the negligence of the plaintiff as against that of the defendant in the ratio that the one bears to the other and render a verdict for plaintiff for such an amount as you find him entitled to after making such deduction, in other words and perhaps to illustrate this point more clearly; if you find that plaintiff did not assume the risk, and that both parties to
80 this action were negligent and that the accident was the result of such combined negligence, plaintiff will nevertheless, be entitled to recover.

If you find that the negligence of the plaintiff and that of the defendant is equal it would reduce the amount of the recovery one-half. If you should find, for instance, that the plaintiff's negligence was twice as great as that of the defendant you would reduce it accordingly. If you should find that defendant's negligence was only half of that of the plaintiff's you would so reduce it. I think you will understand what I intend to charge you by what I have said.

A verdict in this case must be founded upon the evidence, to have any force or effect whatever. If it is not based upon the evidence it cannot, of course, stand.

If upon a consideration of all of the evidence in the case you are unable to find how this accident happened, if you are, from a full and fair consideration of the evidence unable to say how it happened you are not permitted to speculate, or guess or conjecture how it happened, but in such case, if you are so unable to say, your verdict must be for the defendant. It is not all accidents which give rise to a cause of action. If this was an unavoidable accident, one that could not have been guarded against, for instance, of course then no recovery could be had, and if you are unable, under all of the evidence in the case to come to a conclusion as to how it happened or what was the cause of this accident, whether
81 the defendant was to blame or not you must return a verdict in favor of the defendant.

The weight of the evidence is for you. It is for you to determine the facts, exclusively for you to determine the facts from all of the evidence in the case, you will determine them from the examination, the direct and cross examination of the plaintiff, as well as the other witnesses and from the stipulated facts in the record; you will take all of that into consideration and from a consideration of it all, say what the verdict should be.

You are the judges and the exclusive judges of all of the evidence in the case and you are the judges of the credit to be given the

witnesses. You have seen the witnesses upon the stand. The facts in the case are brief and it is for you to say from the consideration thereof as I have stated, what the verdict should be.

You will calmly, carefully and candidly survey and consider all the evidence, the situation as it has been pictured and dismiss from your minds any statement made by counsel, by either counsel, as to facts not brought out by the evidence, nor given in court here.

You will not take any statement from the Court as evidence in the case, only take the law from the Court and apply the rules of law that the Court has given you to the evidence and your verdict founded upon the law and the evidence will be a correct one, if it is founded upon anything else it will not stand.

82 Plaintiff asks the Court to charge the jury that if it appears that plaintiff was, while working about the machinery, by some misstep or accident involuntarily thrown in contact with this machinery, that though he knew the danger and appreciated the risk, still it is a question of fact for them whether he is entitled to recover or not.

Motion denied and plaintiff excepts.

Except as covered by the general charge, the requests of plaintiff are refused.

Plaintiff excepts to the refusal of the Court to give his requests as presented.

Submitted to the jury at 2:45 o'clock p. m. December 11th, 1914.

At 6:40 p. m. the jury were brought into court and charged by the court as follows:

GENTLEMEN OF THE JURY: We have a statute in this State which provided that after a jury has deliberated upon a verdict for 12 hours and they are then unable to agree upon a verdict 10 jurors or 11 jurors, after deliberating for 12 hours may agree upon a verdict and it becomes then a valid verdict.

Now if you should be unable to agree upon a verdict after you have deliberated 12 hours, that is 12 hours after you go into the jury room, which will take it practically to 3 o'clock in the morning, after you have so deliberated, 10 or 11 of your number can agree upon a valid verdict. And if you agree to what is

83 known in law as a five-sixth- verdict, that is less than a unanimous verdict, 10 or 11 of you agree on a verdict, all the jurors agreeing to the verdict must sign it. You cannot render a five-sixth- verdict until after the expiration of 12 hours, 12 hours' deliberation.

When you agree upon a verdict seal it, leave it with your foreman and disperse and come into court here at 9 o'clock in the morning and deliver it as your verdict in the case.

The jury returned into court at 9 o'clock a. m. December 12th and rendered the following verdict: "We, the jury impaneled and sworn in the above entitled action, find a verdict in favor of the plaintiff and assess his damages at the sum of $12,500.

By consent of parties, all proceedings were stayed for 40 days. The plaintiff requested the Court to instruct the jury as follows:

Plaintiff's Requested Instructions.

I.

In this action it is admitted that the defendant is an interstate railroad, and that the plaintiff was employed by it in interstate commerce at the time of his injury. This being so, the rules of
84 law governing this case are those of the so-called Federal Employers' Liability Law. This provides in part "That every common carrier by railroad while engaged in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficient care due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

III.

In this action the plaintiff Knapp was the agent and servant of the defendant Great Northern Railway Company and the defendant owed to him certain duties. It was the duty of the defendant to use reasonable care to the end that the place in which plaintiff was obliged to work might be made reasonably safe for the performance of his duties therein.

IV.

The plaintiff claims that the defendant was negligent in failing to guard certain of the machinery in the pump house at Dassel. It was the duty of the defendant to use such care as an ordinarily prudent and careful person would use to the end that the machinery in question might be made reasonably safe for workmen in
85 the vicinity thereof. And if you find that the machinery in question was unguarded and that it was practicable to guard the same and that the defendant, by the exercise of such care should have so guarded such machinery but failed so to do, then such failure would constitute negligence on the part of the defendant, and if such negligence caused the injury to plaintiff, then the defendant would be liable in this case.

VI.

The defendant claims in this case that the plaintiff assumed the risk of working in the pump house in question. The law of this state is that if any accident happens to one while in the vicinity of unguarded machinery, without an affirmative act of negligence upon

his part, whereby he comes in contact with such unguarded machinery and is injured, he cannot be held to have assumed the risk of working in the vicinity of such unguarded machinery. See 110 Minn. 40.

VII.

The fact, if you find it to be a fact in this case, that the plaintiff knew the machine was unguarded and that he would be injured if he came in contact with it, does not, of itself, establish that he assumes the risk of working near the same. It must not only be shown that the plaintiff knew it was dangerous but that he understood and appreciated the risks or dangers to which he was exposed. See Gilbert v. City of Tracy, 115 Minn. 443.

86 **Ex. 1.**

314-300-M. St. P.

Form 214.

Great Northern Railway Company.

Station ——, —— —, 191–.

LITCHFIELD, MINN., June 8th, 1914.

Mr. Kimball:

DEAR SIR: I understand you want a kind of a statement from me as to how the accident occurred by which I lost my right arm at the elbow.

Well there is nothing more that I can say than I have already stated and the accident is just as much of a mystery to me as to any one else for I am absolutely unable to tell how it occurred.

I will state however that Dassel is usually a very busy station and on the day of the accident it was exceptionally so. At noon I tryed to get time to go down and start the engine but on account of my work was unable to do so, I will state for your information that the pump is more than a half mile from the station. At about 5:45 p. m. I got my work in shape so I could leave for a few minutes and so remarked to the helper that I would have to work three or four hours that evening to get my work up in shape so I would be able to get through the next day which was not uncommon for me to do, and that I would run down and start the pump and let it run until I quit that evening, and in that

87 way would have water enough in the tank to last over night.

I went down and had just got it started and turned to come out of the house when I felt a jerk at my arm and noticed my coat was torn at the shoulder and then for the first — discovered that my arm was gone. It was all done so quick and so sudden that I could not realize what had been done. I had done nothing different than I had done hundreds of times before and ever since the ac-

cident I have been trying to figure out just how it was done but have not been able to do so.

As soon as I realized that my arm was gone I grabbed the stub with my left hand to stop the flow of blood and started for town, and upon reaching the first house I had them telephone to Dr. Peterson to be in his office when I arrived. He was there and did what he could for me, prepared me to go to Litchfield in an auto which place I reached about 7:45 P. M. where the Doctors Peterson and Donovan found it necessary to amputate the arm at the elbow I have since been at the Litchfield hospital, Litchfield, Minn. but expect to go to Dassel today as arm is about healed.

I now expect to go to Minneapolis about Thursday of this week and will probably return the following Sunday or Monday to Dassel.

O. B. KNAPP.

88 Ex. E.

10-13. 10M. E.

Form 245.

Great Northern Railway Company.

Report of Personal Injury to Employes, Passengers, or Other Persons.

Instructions.—A separate blank must be filled out for each person injured, whether injury is severe or slight, by each employe present.

These questions must be answered and information given by parties having personal knowledge of how accident happened.

If you do not personally know how it happened or cause of same give all informatios secured by you stating from whom you secured the information and give names, occupations and addresses of parties having personal knowledge of accident.

If blank spaces are insufficient for full statements, answer further in form of letter and attach hereto.

Every question bearing on this accident must be answered fully.

Report of Accident to O. B. Knapp.

Occupation? Station Agent.
At or near Dassel on the 12th day of May 1914.
(Time of day) About 6 P. M.
Age? 65.
Married or Single? Married.
Employe, Passenger or Trespasser? Employe.
P. O. Address? Dassel.
89 If Employe, how long in service? 37.
If Married, name and address of husband and wife? Jennie Knapp, wife.

Did you see accident? Felt it.

State fully how accident happened as fas as you know. 1st I had started engine in usual manner—2nd I was doing nothing out of the regular routine work—3rd I am unable to tell how my arm was caught—4th had there been room enough to get around engine I would not have been hurt.

State fully nature and extent of injuries? Right arm off at elbow.

What was done with and for injured person? Went immediately to Dr. Peterson, a distance of one half mile who is Company Doctor at Dassel. Who immediately brought me to Litchfield and placed me in charge of Dr. J. J. Donovin who amputated the arm. No further information can be given.

Signed by O. B. KNAPP.

STATE OF MINNESOTA,
County of Meeker:

District Court.

O. B. KNAPP, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Order Allowing Settled Case.

The foregoing official transcript of proceedings upon the trial of the action above entitled, having been by me examined and found conformable to the truth and containing all the evidence, rulings, exceptions and proceedings had upon the trial of said action, same is hereby allowed as and for a settled case herein.

90 Photographs, Exhibits "2" and "3" and exhibits introduced at the trial and referred to in the transcript are hereby made a part of said settled case, the same as if actually incorporated in said transcript.

March 16th, 1915.

G. E. QVALE,
District Judge.

STATE OF MINNESOTA,
County of Meeker:

District Court.

O. B. KNAPP, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Notice of Motion.

To the above named plaintiff and to Davis & Michel, Attorneys for Plaintiff.

SIRS: You will please take notice, That on the 12th day of February, 1915, at the judge's chambers at the Court House in the

city of Willmar, Kandiyohi County, Minnesota, at two o'clock P. M., or as soon thereafter as counsel can be heard, the defendant in this action will apply to the court, the Honorable G. E. Qvale (Judge) for an order setting aside the verdict herein rendered in favor of the plaintiff and ordering judgment in favor of this defendant notwithstanding said verdict, which motion will be made upon a settled case and upon the files and records in this action, and which motion will be based on the following grounds:

(1) That upon all the evidence and the law applicable thereto plaintiff is not entitled to recover and has not proven the
91 allegations of the complaint and has not established negligence or liability on the part of this defendant.

(2) That the defendant was entitled to a directed verdict, which motion therefor was made at the close of the evidence of the case and in the following form:

"The defendant moves that the Court instruct the jury to return a verdict for the defendant for the reason that the plaintiff has wholly failed to prove the allegations of his complaint and wholly failed to prove negligence on the part of the defendant;

And for the further reason that it conclusively appears from the testimony that the accident was caused and occasioned by risks which the plaintiff assumed as part of his employment;

And for the further reason that any verdict in this case would be based upon mere conjecture or speculation, as the plaintiff has wholly failed to prove what caused the accident."

You will please take notice further: That in case the court should deny the foregoing motion, defendant at the same time and place will thereupon move said court for an order setting aside said verdict and granting a new trial of this case, which motion will be made upon a settled case and upon the files and records herein and upon the following grounds:

92

I.

That said verdict is not justified by the evidence.

II.

That said verdict is contrary to law.

III.

The court erred in denying defendant's motion to dismiss the action at the close of plaintiff's case, which motion was as follows:

"At this time the defendant moves that the action be dismissed for the reason that the plaintiff has wholly failed to prove the allegations of the complaint.

And for the further reason that it appears from plaintiff's testimony that the accident occurred by him slipping and throwing out his hand, or his coat was caught and pulled him forward. That a verdict based upon this testimony would be a matter of mere conjecture for the reason that if the accident was due to the plain-

tiff slipping it is clearly a risk that he assumed and the plaintiff cannot recover if the accident was due to slipping as he says it may have been caused by.

And for the further reason that, assuming that the accident was caused in either of the ways in which the plaintiff testified that it was caused that the condition that occasioned the same was a risk which he has assumed as a part of his employment."

93 IV.

The court erred in failing to charge the jury in substance that if they were unable to say whether the accident was caused by the plaintiff's coat being caught on the set screw, or from his slipping on the floor, then their verdict must be for the defendant.

V.

The court erred in failing to charge the jury in substance that if they believed from the testimony that the proximate cause of the accident was the fact that the plaintiff slipped upon the floor, as he claimed, then the jury must find for the defendant.

VI.

The verdict awards excessive damages, appearing to have been given under the influence of passion and prejudice.

You will please take notice, that immediately before the hearing of said motion, the undersigned will apply to Judge Qvale for an order allowing as a settled case, the proposed case heretofore served upon you.

Yours respectfully,

M. L. COUNTRYMAN AND
A. L. JANES,
Attorneys for Defendant,
203 *Great Northern Building,*
St. Paul, Minnesota.

94 STATE OF MINNESOTA,
County of Meeker:

District Court.

O. B. KNAPP, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Order.

This action was brought to recover damages for personal injuries sustained through defendant's alleged negligence. Plaintiff had a verdict for $12,500 and the defendant brings this its alternative mo-

tion for judgment notwithstanding the verdict, or, if that be denied, for a new trial.

In support of the motion for judgment it is urged that it was error to submit the case to the jury for the reason, among others, that the evidence clearly established that plaintiff assumed the risk.

I am unable to fully convince myself that the evidence is conclusive in favor of the defendant on that point, therefore the motion for judgment is denied.

One of the grounds upon which the motion for new trial is based is that the verdict is excessive.

The plaintiff was more than sixty years of age at the time of the accident which resulted in the loss of his right arm at the elbow. At the time of the trial he had fully recovered his general good health. The evidence in the case is uncontradicted but of a character that impels the conclusion that the verdict is excessive and that a new trial must be granted unless the plaintiff shall remit therefrom the sum of $2,500.

Therefore, ordered that the verdict be set aside and a new trial granted unless the plaintiff shall, within ten days after notice of the filing of this order, remit the sum of twenty-five hundred
95 dollars from the amount of the verdict, but it is further ordered that the said motion be denied if plaintiff shall within said ten days file such remittitur with the clerk of this court and give notice thereof to the defendant.

Ordered accordingly.

Dated March 18th, 1915.

G. E. QVALE, *Judge.*

STATE OF MINNESOTA,
County of Meeker:

District Court.

O. B. KNAPP, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

To A. L. Janes, Attorney for Defendant, and to C. H. Atkinson, Clerk of said District Court.

Whereas the Court did on the 18th day of March, 1915, make an Order granting a new trial of the above entitled action unless Plaintiff remitted from the verdict the sum of Twenty Five Hundred ($2,500.00) Dollars.

Now, therefore, and in pursuance of said Order of the Court plaintiff does hereby remit from said verdict the sum of Twenty Five Hundred ($2,500.00) Dollars and does hereby accept said verdict as reduced by the trial Court.

DAVIS & MICHEL,
Plaintiff's Attorneys, Marshall, Minnesota.

Dated this 20th day of March, 1915.

96 STATE OF MINNESOTA,
County of Meeker:

District Court.

O. B. KNAPP, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Notice of Appeal.

To Davis & Michel, Attorneys for Plaintiff, and C. H. Atkinson, Clerk of the District Court.

SIRS: You will please take notice, that the Great Northern Railway Company, defendant in the above entitled action, appeals to the Supreme Court of the state of Minnesota from the order of this Court in this action made on the 18th day of March, 1915, and filed on the 20th day of March, 1915, denying defendant's motion for judgment notwithstanding the verdict and its motion for a new trial and from the whole thereof.

M. L. COUNTRYMAN,
A. L. JANES,
Attorneys for Defendant,
203 *Great Northern Building,*
St. Paul, Minnesota.

Dated March 23rd, 1915.

Bond on appeal is hereby waived and it is hereby stipulated that all proceedings in this action shall be stayed until the determination of this appeal.

DAVIS & MICHEL,
Attorneys for Plaintiff.

97 STATE OF MINNESOTA:

In Supreme Court, April Term, 1915.

O. B. KNAPP, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Assignments of Error.

I.

The court erred in denying defendant's motion for judgment in its favor notwithstanding the verdict upon the following grounds:

(*a*) That upon the law and the evidence applicable thereto plaintiff is not entitled to recover.

(*b*) That the evidence wholly failed to establish any negligence or liability on the part of defendant.

(*c*) That it conclusively appears from the evidence that plaintiff's injury resulted from a risk which he assumed as a part of his employment.

(*d*) That defendant was entitled to a directed verdict, which motion therefor was made at the close of the testimony, said motion being as follows:

"The defendant moves that the Court instruct the jury to return a verdict for the defendant for the reason that the plaintiff has wholly failed to prove the allegations of his complaint and wholly failed to prove negligence on the part of the defendant;

And for the further reason that it conclusively appears from the testimony that the accident was caused and occasioned by risks which the plaintiff assumed as part of his employment;

And for the further reason that any verdict in this case would be based upon mere conjecture or speculation, as the plaintiff has wholly failed to prove what caused the accident."

II.

The court erred in denying defendant's motion for a new trial on the ground that the said verdict is not justified by the
98 evidence and is contrary to law.

III.

The court erred in denying said motion for a new trial upon the ground of excessive damages, appearing to have been given under the influence of passion and prejudice and not justified by the evidence.

M. L. COUNTRYMAN,
A. L. JANES,
Attorneys for Appellant, St. Paul, Minnesota.

Filed June 5, 1915. I. A. Caswell, Clerk.

99 No. 19366-240. State of Minnesota Supreme Court, April Term, A. D. 1915. O. B. Knapp, Respondent, vs. Great Northern Railway Company, Appellant. Opinion and Syllabus. Filed July 16, 1915. I. A. Caswell, Clerk. Holt, J.

100 240-19366. Meeker County. Holt, J.

O. B. KNAPP, Respondent,
v.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Syllabus.

In this action under the Federal Employers' Liability Act the evidence is held to make the issues of defendant's negligence, plain-

tiff's contributory negligence and assumption of risk for the jury and not the court.

It was also for the jury to determine whether defendant's negligence was the proximate cause of the injury.

The damages as reduced are not so excessive as to warrant interference by this court.

Affirmed.

Plaintiff lost his arm while at work for defendant. He alleged defendant's negligence to be the cause of his misfortune, and recovered heavy damages. The court denied defendant's motion for judgment notwithstanding the verdict, but ordered a new trial unless plaintiff consented to a reduction of the verdict. Plaintiff consented and defendant appeals.

It was conceded that when the injury was received plaintiff as a servant of defendant was engaged in work pertaining to defendant's business of a common carrier of interstate commerce. The pleadings were amended upon the trial so as to predicate recovery under the provisions of the Federal Employers' Liability Act. Our state statute has therefore no bearing upon the issue of negligence, contributory negligence, or assumption of risk. This is fully set at rest in Seaboard Air Line v. Horton, 233 U. S. 492. The contention is that no negligence on the part of defendant was proven; that the defendant's assumption of the risk from which he was injured conclusively appeared; that there was a failure to prove defendant's negligence the proximate cause; and that excessive damages were awarded.

101 Plaintiff was the station agent at Dassel, Minn. He also had to attend the pump-house, some distance from the station, once or twice a day, so that the water tank for the locomotives was kept filled. The water was supplied by means of a triple pump operated by a gasoline engine. The pump and engine were in a small room. The fly-wheel of the engine was about 6 feet in diameter, leaving the horizontal shaft connecting with the pump about 3 feet from the floor. Upon this shaft was the clutch by which the pump was set in motion, and between the clutch and the crank near the fly-wheel were two protruding set screws. After starting the engine, which had to be done by turning the fly-wheel, plaintiff turned down some grease cups on the pump. These cups were between the pump and the rear wall of the building. In order to throw the clutch to start the pump plaintiff had to pass near the shaft mentioned. He was in a hurry, and claims that as he so attempted to pass he lost his balance, either through a slip upon the greasy floor or a jerk by his coat being drawn into the fly-wheel or shaft, and in striking out to catch himself his hand and part of the arm came between the crank of the shaft and top of the hood which partially, but in-equately guarded it. The crank revolved towards the top of this guard. Plaintiff says his arm was cut off so quickly that he did not know it was gone until he saw the blood spurt from the stump. The evidence is very clear that it was practicable and feasible to have guarded the set screws and crank so as

to fully protect from danger those who had to pass by. We think the jury was justified in finding the defendant negligent under the common law rule governing the duties of the master. See cases cited under Sect. 5895, Dunnell's Minn. Digest.

Under the federal act contributory negligence does not defeat recovery, it merely serves to reduce the damages, while assumption of risk, under the facts of the case at bar, is a complete defense. For that reason plaintiff's counsel desires everything which tends toward proving assumption of risk attributed to plaintiff's negligence, and defendant's counsel is equally eager to resolve all appearance of contributory negligence into an assumption of risk.

102 Plaintiff had had charge of the running of the pumping outfit, not including the repairs thereon, for over eight years. He was of mature age, and, no doubt, of average intelligence. Had he been caught on the set screws or got his hand between the guard and crank while working over, or with, the shaft the legal inference might be conclusive that the risk incident thereto was assumed by him. But he had just turned some grease cups on the rear of the pump and started to go to the front of the engine to throw the clutch in gear. In so doing it is easy to understand how the jury could find that in his hurry he either slipped on the greasy floor, or inadvertently and negligently came too near the shaft and flywheel. It does not much matter which, because the jury could well say neither came within the risks understood and appreciated by plaintiff, that it was an involuntary and unfor-seen mishap. Both causes given for losing his balance may be referable to plaintiff's negligence rather than to an assumption of known and appreciated danger arising out of defendant's negligence. We appreciate this to be a very close case upon the issue of assumption of risk, but believe it to come within such decisions as Glockner v. Harwood Mfg. Co., 109 Minn. 30, Snyder v. Waldorf Box Board Co., 110 Minn. 40, and Falconer v. Sherwood, 118 Minn. 357.

Whether the defense of assumption of risk has been made out is ordinarily for the jury. And so it would be for the jury to say whether facts and circumstances proven establish contributory negligence or assumption of risk, for in some respects the two defenses blend. In Jones v. East Tennessee V. & G. Ry. Co., 128 U. S., 443, it was said with reference to the issue of contributory negligence "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." This statement was approved in Washington & G. Ry. Co. v. McDade, 135 U. S. 554, wherein were involved the issues found in the case at bar. See also, Choctaw O. & G. Ry. Co. v. McDade,

103 191 U. S. 64; McGovern v. Phila. & Reading Ry. Co. 235 U. S. 389; Seaboard Air Line Co. v. Padgett, 236 U. S. 668.

The learned trial court submitted the issue of contributory negligence and assumption of risk to the jury so fully and accurately that no fault is found by defendant in that respect.

It is also said plaintiff's negligence was the sole cause of the injury. That had he not slipped or come so near that his clothing

had caught the accident would not have happened. We think it more reasonable to say that his stumbling would have been of no serious consequence had there been no negligence in leaving a dangerous place exposed upon the machinery. The conclusion is readily and properly at hand that the absence of a suitable guard for the crank shaft was the proximate cause, Rase v. Minneapolis, St. Pa. & S. Ste. M. Ry. Co., 107 Minn. 260; Swick v. Ætna Co., 147 Mich. 454.

The trial court reduced the damages to $10,000. Plaintiff, when injured, was near 60 years old and earning about $120. per month. He lost his right arm at the elbow. He was right-handed. The amount as approved by the trial court is very liberal, but not excessive in the opinion of a majority of this court.

Affirmed.

HOLT, *J.*

104 State of Minnesota, Supreme Court, April Term, A. D. 1915.

No. 240.

O. B. KNAPP, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause July 16, A. D. 1915,

It is here and hereby determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court of the Twelfth Judicial District, sitting within and for the County of Meeker be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Sixty-eight and 00/100 dollars, ($68.00) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed July 29, A. D. 1915.

By the Court.

Attest:

I. S. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs, $25.00; Printer, $32.25; Clerk, $10.25; Acknowledgments, $.50; Return, $—; Postage and Express, $—; Filing Mandate, $—; Total, $68.00.

105 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment

in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, July 29, A. D. 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

State of Minnesota, Supreme Court. Transcript of Judgment. Filed July 29, A. D. 1915. I. A. Caswell, Clerk.

106 No. 19366. State of Minnesota, Supreme Court. O. B. Knapp, Respondent, against Great Northern Railway Company, Appellant. Judgment Roll. Filed July 29, 1915. I. A. Caswell, Clerk.

107 STATE OF MINNESOTA,
Supreme Court, ss:

Mandate.

The State of Minnesota to the Honorable Judge and Officers of the District Court of the Twelfth Judicial District sitting within and for the County of Meeker, Greeting:

Whereas, Lately in your Court, in an action therein pending, between O. B. Knapp, Plaintiff, and Great Northern Railway Company, Defendant, a certain order was entered therein March 26, 1915, from which action of your Court an appeal thereafter was taken to this Court;

And Whereas, The said cause came on to be heard before our Supreme Court, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the Court below herein appealed from, be, and the same hereby is, in all things affirmed and that judgment be entered accordingly. A copy of the entry of Judgment thereupon in this Court is herewith transmitted and made part of this Remittitur.

Now, Therefore, This Mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith Remanded to your Court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness, The Honorable Calvin L. Brown, Chief Justice of the Supreme Court aforesaid, and the seal of said Court at St. Paul, this 29th day of July, 1915.

[SEAL.]

I. A. CASWELL,
Clerk of the Supreme Court,
By —— ——, *Deputy.*

108 STATE OF MINNESOTA,
County of Meeker:

District Court, 12th Judicial District.

Judgment.

O. B. KNAPP, Plaintiff,
against
GREAT NORTHERN RAILWAY COMPANY, Defendants.

It is stipulated and agreed in writeing between the above named parties O. B. Knapp, Plaintiff, and Great Northern Railway Company, Defendants, that the Plaintiff in the above entitled action have and recover Judgment against the Defendants the Great Northern Railway Company for the sum of Ten Thousand Four Hundred Sixty Two Dollars and Fourty Seven Cents ($10462 47/100) plus Clerk's fees amounting to Thirteen & 75/100 Dollars and it is further stipulated and agreed that Judgment may be entered without any other notice to either party to the action for the sum above mentioned.

Now, Therefore; On fileing, and persuant to the said stipulation signed by Davis & Michael Attorneys for Plaintiff and M. L. Countryman and A. L. Janes, Attorneys for Defendants, It is adjudged and decreed that O. B. Knapp Plaintiff, in whose favor said stipulation is made recover of the Great Northern Railway Company Defendants the sum of Ten Thousand Four Hundred Sixty Two and 47/100 Dollars together with Thirteen & 75/100 Dollars Clerk's fees in said action, amounting in all to Ten Thousand Four Hundred Seventy Six and 22/100 Dollars.

Dated at Litchfield, Minn., this 31st day of July, A. D. 1915.

[SEAL.] C. H. ATKINSON,
Clerk District Court.

109 STATE OF MINNESOTA,
County of Meeker, ss:

I, C. H. Atkinson, clerk of the District Court in and for said county, hereby certify that I have compared the foregoing Judgment with the original Judgment now of record in my office, and the same is a true and correct copy thereof.

Witness my hand and official seal, at Litchfield, in said county, this 13th day of October, A. D. 1915.

[SEAL.] C. H. ATKINSON, *Clerk.*

(Endorsed:) Filed July 31 1915. C. H. Atkinson, Clerk.

110 STATE OF MINNESOTA,
County of Meeker:

District Court, Twelfth Judicial District.

O. B. KNAPP, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Notice of Appeal.

To Davis & Michel, Attorneys for Plaintiff, and C. H. Atkinson, Clerk of the District Court:

SIRS: You will please take notice that the Great Northern Railway Company, defendant in the above entitled action, appeals to the Supreme Court of the State of Minnesota from the judgment of this court in this action entered on the 31st day of July, 1915, in favor of said plaintiff and against said defendant, in the sum of ten thousand four hundred seventy six & 22/100 Dollars ($10,476.22); and from the whole thereof.

M. L. COUNTRYMAN,
A. L. JANES,
Attorneys for Defendant, 203 Great Northern Building, St. Paul, Minnesota.

Dated at St. Paul, Minnesota, July 31st, 1915.

111 Copy. State of Minnesota, District Court, Meeker County. O. B. Knapp, Plaintiff, vs. Great Northern Railway Company, Defendant. Notice of appeal. Due and personal service of the within is hereby admitted this 31 day of July, 1915. Davis & Michel, Att'y- for plaintiff. C. H. Atkinson, Clerk, District Court. M. L. Countryman and A. L. Janes, Attorney- for Defendant, 3rd and Rosabel Sts., St. Paul, Minn.

112 STATE OF MINNESOTA,
County of Meeker:

District Court, Twelfth Judicial District.

O. B. KNAPP, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Stipulation Waiving Bond.

Bond on appeal is hereby waived and it is hereby stipulated that all proceedings in this action shall be stayed until the final determination of this appeal.

DAVIS & MICHEL,
Attorneys for Plaintiff.

Dated at Marshall, Minn., July 27, 1915.

113 STATE OF MINNESOTA,
County of Meeker, ss:

In the District Court, 12th Judicial District.

In the Matter of O. B. KNAPP, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

I, C. H. Atkinson, Clerk of the District Court, of Meeker County and State of Minnesota, do hereby certify and return to the honorable the Supreme Court of said State, that I have compared the foregoing and attached paper writing with the original Notice of Appeal and Stipulation waiving Bond in the action above entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said originals and the whole thereof.

Witness my hand and seal of said Court, at Litchfield, Minn., this 12th day of August, A. D. 1915.

[Seal District Court, Meeker County, Minn.]

C. H. ATKINSON, *Clerk,*
By —— ——, *Deputy.*

114 No. 19493. District Court, 12th Judicial District, County of Meeker. O. B. Knapp, Plaintiff, against Great Northern Railway Company, Defendant. Return to Supreme Court. Filed Aug. 13, 1915. I. A. Caswell, Clerk.

115 STATE OF MINNESOTA:

Supreme Court, October Term, 1915.

O. B. KNAPP, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Whereas, the above entitled action was duly tried and a verdict by the jury rendered in the District Court of Meeker County, Minnesota, against the defendant and in favor of the plaintiff,

And Whereas, the defendant's alternative motion for a new trial or for judgment notwithstanding the verdict was duly presented and denied in said court,

And Whereas, an appeal from said order was taken to this court,

And Whereas, this court duly considered the same and affirmed the order of the trial court,

And Whereas, the plaintiff did thereafter duly cause judgment to be entered in his favor and against the defendant in the sum of $10,476.22, which judgment was made and entered on the 31st day of July, 1915.

And Whereas, the defendant did immediately thereafter take an appeal from said judgment to this court,

And Whereas, no questions are involved on said second appeal different from those involved on the first appeal.

Now therefore, it is agreed and stipulated by and between the parties respectively, through their respective attorneys, that said appeal from said judgment may be submitted to this court forthwith upon the same printed record and same briefs and assignments of error as presented on the first appeal and without oral argument.

Dated Sept. 15th, 1915.

DAVIS & MICHEL,
Attorneys for Respondent.
M. L. COUNTRYMAN AND
A. L. JANES,
Attorneys for Appellant.

(Endorsed:) Filed Sep. 17, 1915. I. A. Caswell, Clerk.

116 STATE OF MINNESOTA:

Supreme Court.

19493.

O. B. KNAPP, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Per *Curiam:*

This cause was before us on a former appeal, where the order of the lower court denying a new trial was affirmed. Upon the remand of the cause judgment was entered on the verdict, from which judgment the present appeal was taken by defendant. Upon stipulation of the parties the appeal was submitted upon the record and briefs on the former appeal.

Now, after due consideration, and for reasons stated in the former opinion, the judgment appealed from is affirmed.

(Endorsed:) Filed Sep. 17, 1915. I. A. Caswell, Clerk.

117 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1915.

No. —.

O. B. KNAPP, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause September 17, A. D. 1915

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the Dis-

trict Court of the Twelfth Judicial District, sitting within and for the County of Meeker be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Great Northern Railway Company, Appellant herein the sum and amount of Ten Thousand Six Hundred Twelve and 96-100 Dollars ($10,612.96), including costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed October 4, A. D. 1915.

By THE COURT.

Attest:
I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs, $25.00; Printer, $—; Clerk, $—; Acknowledgments, $—; Return, $—; Postage and Express, $—; Filing Mandate, $—; District Court Judgment, $10,476.22; Interest, $111.74; Total, $10,612.96.

118 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, October 4, A. D. 1915.

[SEAL] I. A. CASWELL, *Clerk.*

State of Minnesota, Supreme Court. Transcript of Judgment. Filed October 4, A. D. 1915. I. A. Caswell, Clerk.

I. A. CASWELL, *Clerk.*

119 STATE OF MINNESOTA:

Supreme Court.

No. 19493.

O. B. KNAPP, Respondent,
against
GREAT NORTHERN RY. CO., Appellant.

Judgment Roll.

Filed October 4, 1915.

I. A. CASWELL, *Clerk.*

120 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of O. B. Knapp, Respondent, vs. Great Northern Railway Company, Appellant, and also of the opinions of the court rendered therein together with the assignment of errors, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this October 15, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

121 In the Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
O. B. KNAPP, Defendant in Error.

Assignments of Error.

Comes now the Great Northern Railway Company, Plaintiff in Error, in the above entitled cause, and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of Minnesota erred to the grievous injury and wrong of the Plaintiff in Error herein, and to the prejudice and against the rights of the Plaintiff in Error, in the following particulars, to-wit:

I.

The said Supreme Court erred in affirming the judgment entered in the District Court in favor of Plaintiff in Error.

II.

The said Supreme Court erred in holding under the Federal Employers' Liability Act that on the undisputed facts of the case the right of the Defendant in Error to recover was not barred by the common law doctrine of assumption of risk.

III.

The said Supreme Court erred in failing to apply to the undisputed facts of the case under the Federal Employers' Liability Act the principles of the doctrine of assumption of risk as they existed at common law.

IV.

The said Supreme Court erred in not reversing the judgment of the trial court and in denying to Plaintiff in Error its rights under the Federal Employers' Liability Act.

122 V.

The said Supreme Court erred in failing to hold under the provisions of the Federal Employers' Liability Act that the Defendant in Error assumed the risk of being injured from the unguarded set screw and crank shaft.

VI.

The said Supreme Court erred in holding on the undisputed facts of the case under the provisions of the Federal Employers' Liability Act that Plaintiff in Error was guilty of negligence.

Wherefore, for these and other manifest errors appearing in the record, the said Great Northern Railway Company, Plaintiff in Error, prays that the judgment of the said Supreme Court of the State of Minnesota be reversed and set aside and held for naught, and that judgment be rendered for Plaintiff in Error granting it its rights under the statutes of the United States, and Plaintiff in Error also prays for judgment for its costs.

E. C. LINDLEY,
Attorney for Great Northern Railway Company, Plaintiff in Error.

M. L. COUNTRYMAN,
A. L. JANES,
Of Counsel.

123 [Endorsed:] 19493. In the Supreme Court of the United States. Great Northern Railway Company, Plaintiff in Error, vs. O. B. Knapp, Defendant in Error. Assignments of Error. Filed Oct. 8, 1915. I. A. Caswell, Clerk.

124 In the Supreme Court of the State of Minnesota.

O. B. KNAPP, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Petition for Writ of Error.

To the Honorable Justices of the Supreme Court of the State of Minnesota:

Your Petitioner, the above named Great Northern Railway Company, respectfully shows that on the 4th day of October, 1915, the Supreme Court of the State of Minnesota rendered a final judgment against your Petitioner in a certain case wherein your Petitioner was defendant, and O. B. Knapp was plaintiff, as will appear by reference to the record and proceedings in said case, and that the said court is the highest court of law or equity in said state in which a decision in said suit could be had; that by the said suit there was drawn in question the construction of certain statutes

of the United States relating to the liability of common carriers by railroad to their employes engaged in commerce between any of the several states or territories, and the decision of this court is against the right claimed by the said Great Northern Railway Company, Appellant, and as it believes, contrary to the statutes of the United States relating to the liability of common carriers by railroad to their employes engaged in interstate commerce, and against the right of the said Great Northern Railway Company thereunder, all of which will more fully appear in detail from the assignments of error filed herein.

Wherefore, the said Great Northern Railway Company prays that a writ of error may issue to the Supreme Court of the State of Minnesota for the correcting of the error complained of, and
125 that a duly authenticated transcript of the record, proceedings and papers therein may be sent to the United States Supreme Court.

GREAT NORTHERN RAILWAY COMPANY,
By E. C. LINDLEY,
Attorney for Respondent.

M. L. COUNTRYMAN,
A. L. JANES,
Of Counsel.

126 In the Supreme Court of the State of Minnesota.

O. B. KNAPP, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Order Allowing Writ of Error.

Comes now the Great Northern Railway Company, the Appellant above named, on this 4th day of October, 1915, and files and presents to this Court its petition praying for the allowance of a writ of error intended to be urged by it, and praying further that the duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this Court desiring to give petitioner an opportunity to test in the Supreme Court of the United States the question herein presented,

It is ordered that a writ of error be allowed as prayed, provided, however, that the said Great Northern Railway Company, appellant, give bond according to law in the sum of Twelve Thousand Dollars ($12,000.00), which bond shall operate as a supersedeas bond.

In testimony whereof, Witness my hand this 8th day of October, 1915.

CALVIN L. BROWN,
Chief Justice of the Supreme Court
Of the State of Minnesota.

127 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Minnesota, before you, or some of you, being the highest court of law or equity of the said state, in which a decision could be had in the said suit between O. B. Knapp, Plaintiff and Respondent, and the Great Northern Railway Company, Defendant and Appellant, wherein was drawn in question the construction of a clause of the constitution or statute of the United States, and the decision was against the right or privilege especially set up or claimed under the said clause of the constitution or statute, a manifest error hath happened, to the great damage of the said Great Northern Railway Company as by its complaint appears. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this return, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States this 9th day of October, in the year of our Lord, One Thousand Nine Hundred and Fifteen.

128 Done in the City of St. Paul, County of Ramsey, State of Minnesota, with the seal of the District Court of the United States for the District of Minnesota attached.

[U. S. Dist. Court Seal, Third Division, Dist. of Minnesota.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States for the District of Minnesota,
By MARGARET L. MULLANE,
Deputy Clerk.

Allowed by:
CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

129 [Endorsed:] In the Supreme Court of the State of Minnesota. O. B. Knapp, Respondent, vs. Great Northern Railway Company, Appellant. Petition for Writ of Error. Order Allowing Writ of Error. Writ of Error. Filed Oct. 15, 1915. I. A. Caswell, Clerk.

130 Know all men by these presents, that we, Great Northern Railway Company, a corporation organized and existing under the laws of the State of Minnesota, as principal, and National Surety Company, a corporation of the state of New York, as surety, are held and firmly bound unto O. B. Knapp in the sum of Twelve Thousand Dollars ($12,000.00) to be paid to the said obligee, his heirs, representatives and assigns, for the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 4th day of October, 1915.

Whereas, lately in the Supreme Court of the State of Minnesota, in a suit pending in said court wherein O. B. Knapp was respondent and Great Northern Railway Company was appellant, judgment was entered against the said appellant, and said appellant seeks to prosecute its writ of error in the Supreme Court of the United States to reverse the judgment rendered in the said suit.

Now therefore, the condition of this obligation is such that if the above named appellant, Great Northern Railway Company, shall prosecute its said writ of error to effect and pay all costs and damages, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

GREAT NORTHERN RAILWAY COMPANY,
By R. A. JACKSON, *Vice President.*
[CORPORATE SEAL.]

Attest:

L. E. KATZENBACH, *Secretary.*

NATIONAL SURETY COMPANY,
By W. T. McCURDY, *Its Attorney in Fact.*
[CORPORATE SEAL.]

LEWIS D. NEWMAN.
G. E. MILLER.
EVAR CEDARLEY.
M. P. TOOLE.

131 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 4th day of October 1915, before me appeared R. A. Jackson, to me personally known, who, being by me duly sworn, did say that he is the Vice President of the Great Northern Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed on behalf of said corporation by authority of its Board of Directors; and said R. A. Jackson acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] GUSTAVE E. WALBERT,
Notary Public in and for the State of Minnesota, County of Ramsey.

My commission expires June 7, 1919.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 4th day of October 1915, before me appeared W. T. McCurdy, to me personally known, who, being by me duly sworn, did say that he is the Attorney in Fact of the National Surety Company; that the seal affixed to the foregoing instrument was executed on behalf of said corporation, and that said instrument was executed on behalf of said corporation by authority of its board of directors, and said W. T. McCurdy acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] EVAR CEDARLEAF,
Notary Public in and for the State of Minnesota, County of Ramsey.

My commission expires June 2, 1920.

132 [Endorsed:] In the Supreme Court of the United States. O. B. Knapp, Respondent vs. Great Northern Railway Company, Appellant. Bond. (Endorsed:) Filed Oct. 8, 1915. I. A. Caswell, Clerk.

133 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on October 8, 1915, in the matter of O. B. Knapp, Respondent, vs. Great Northern Railway Company, Appellant.

1. The original bond of which a copy is herein set forth;

2. Copies of the writ of error, as herein set forth,—one for each defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this October 15, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

134 *Citation.*

UNITED STATES OF AMERICA, ss:

The President of the United States to O. B. Knapp, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C. within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the state of Minnesota, wherein the Great Northern Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plain-

tiff in Error as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Calvin L. Brown, Chief Justice of the Supreme Court of the State of Minnesota, this 8th day of October, 1915.

CALVIN L. BROWN,
Chief Justice of the Supreme Court
of the State of Minnesota.

We, the undersigned attorneys of record for O. B. Knapp, Defendant in Error in the above entitled case, hereby acknowledge due service of the above citation.

DAVIS & MICHEL.

135 [Endorsed:] In the Supreme Court of the State of Minnesota. O. B. Knapp, Respondent vs. Great Northern Railway Company, Appellant. Citation. Filed Oct. 15, 1915. I. A. Caswell, clerk.

136 UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Minnesota, at my office, in the city of St. Paul, Minnesota, this October 15, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Endorsed on cover: File No. 24,973. Minnesota Supreme Court. Term No. 690. Great Northern Railway Company, plaintiff in error, vs. O. B. Knapp. Filed November 3d, 1915. File No. 24,973.

Office Supreme Court, U. S.
FILED
FEB 18 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 690

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

O. B. KNAPP,
Defendant in Error.

In Error to the Supreme Court of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

E. C. LINDLEY,
Attorney for Plaintiff in Error.
M. L. COUNTRYMAN and
A. L. JANES, of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 690

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

O. B. KNAPP,
Defendant in Error.

In Error to the Supreme Court of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT FOR PLAINTIFF IN ERROR.

This writ of error brings up for review by this court a judgment of the Supreme Court of the State of Minnesota

affirming the judgment of the District Court for Meeker County, Minnesota, in the sum of $10,000 and costs entered on a verdict in favor of defendant in error.

STATEMENT OF FACTS.

The facts in this case are undisputed. Defendant in error was the station agent of plaintiff in error at Dassel, Minnesota. As a part of his duties he had to attend the pump house some distance from the station once or twice a day and keep filled the water tank for locomotives. The water was pumped by means of a gasoline engine. The clutch on the engine was partially guarded. There were two protruding set screws on the main shaft. These were not guarded. In order to throw the clutch, to start the pump defendant in error had to pass near the clutch and set screws. This passageway was narrow. He was in a hurry and claims that as he attempted to pass the clutch and set screws he lost his balance either through slipping upon the greasy floor or his coat was caught on the set screws and he was precipitated on to the crank shaft guard and his hand caught in the clutch and thereby cut off. Plaintiff in error offered no testimony at the trial of the case. With a few additions thereto the facts as stated by the Supreme Court of the state of Minnesota in its opinion are correct.

> "Plaintiff was the station agent at Dassel, Minnesota. He also had to attend the pump-house, some distance from the station, once or twice a day, so that the water tank for the locomotives was kept filled. * * * The pump and engine were in a small room. The fly-wheel of the engine was about 6 feet in diameter, leaving the horizontal shaft connecting with the pump about 3 feet from the floor. Upon this shaft was a clutch, by which the pump was set in motion,

and b tween the clutch near the fly-wheel were two protruding set screws. After starting the engine, which had to be done by turning the fly-wheel, plaintiff turned down some grease cups on the pump. These cups were between the pump and the rear wall of the building. In order to throw the clutch to start the pump plaintiff had to pass near the shaft mentioned. (And set screws.) He was in a hurry. * * *

Plaintiff had had charge of the running of the pumping outfit, not including the repairs thereon, for over eight years. He was of mature age, no doubt, of average intelligence." (R. P. 54.)

The floor was greasy. It was the sole duty of defendant in error to look after and care for the engine, to keep the pump house neat and clean and keep the floor thereof in a proper condition and clean. The machinery in the pump house had not been changed during all the years that defendant in error was employed. He knew that the crank shaft was only partially protected by a guard and that the set screws in the shaft were unprotected. As stated by the trial court in its charge to the jury:

"It appears that plaintiff was an old and experienced employe of the defendant, that he had operated the engine and had entire control of its operation and the machinery connected therewith for about nine years continuously during which time it had been in daily operation and in the same condition in which it was in at the time of the accident * * * so far as appears, he (defendant in error) was in full charge of all the machinery in question and has full knowledge of its condition, and that he gave the same his personal attention, on the average once daily for about nine years, and during all that time the engine—the crank shaft and the set screws—remained in the same condition with respect to guards that it was in at the time of the accident, and he never at any time or in any way notified or informed the defendant or any of its officers or employees that its condition was in any way dangerous." (R. P. 41.)

The accident happened, as stated by the Supreme Court of the State of Minnesota, in the following manner:

> "He was in a hurry, and claims that as he so attempted to pass (crank shaft and set screws) he lost his balance, either through a slip upon the greasy floor or a jerk by his coat being drawn into the fly-wheel or shaft, and in striking out to catch himself his hand and part of the arm came between the crank of the shaft and top of the hood." (R. P. 54.)

Defendant in error, in describing how the accident happened, stated:

> "The accident is just as much of a mystery to me as to any one else, for I am absolutely unable to tell how it occurred. * * * It was all done so quick and so sudden that I could not realize what had been done. I had done nothing different than I had done hundreds of times before and ever since the accident I have been trying to figure out just how it was done but have not been able to do so." (R. P. 17.)
>
> State fully how accident happened as far as you know:
>
> 1st. I had started the engine in the usual manner.
>
> 2nd. I was doing nothing out of regular routine work.
>
> 3rd. I am unable to tell how my arm was caught.
>
> 4th. *Had there been room enough to get around engine I would not have been hurt.* (R. P. 47, Ex. E.)
>
> "As I started away from the pump I had not taken a step I don't think—I don't know just how exactly, but not more than a step, I felt something pulling at my coat, being jerked, I was being drawn over, over towards this crank shaft, one side of it was running—this was the side that was running, next to the engine. I was being pulled over that way, I apparently could not stop myself, I didn't see how I was going to stop myself. * * * I was pulled over in this shape (indicating) so there was no possible way. * * * When I was drawn towards that clutch I threw my hand forward to catch myself. (R. pp. 7-8.)
>
> Q. You say that you slipped on the floor?

A I say that I either slipped or my coat, by the suction from the fly-wheel, was drawn into the clutch. I don't know which, it was either one of the two." (R. P. 16.)

Defendant in error did not know exactly how the accident happened, whether he slipped on the floor and fell into the clutch or whether his coat was caught on the set screws and he was thereby thrown against the clutch and as he testified, "if there had been room enough to get around engine I would not have been hurt."

ASSIGNMENTS OF ERROR RELIED ON IN THIS COURT.

I.

The Supreme Court of the State of Minnesota erred in affirming the judgment entered in the District Court in favor of defendant in error.

II.

The said Supreme Court erred in holding under the Federal Employers' Liability Act that on the undisputed facts of the case the right of the Defendant in Error to recover was not barred by the common law doctrine of assumption of risk.

III.

The said Supreme Court erred in failing to apply to the undisputed facts of the case under the Federal Employers' Liability Act the principles of the doctrine of assumption of risk as they existed at common law.

IV.

The said Supreme Court erred in not reversing the judgment of the trial court and in denying to plaintiff in error its rights under the Federal Employers' Liability Act.

V.

The said Supreme Court erred in failing to hold under the provisions of the Federal Employers' Liability Act

that the defendant in error assumed the risk of being injured from the unguarded set screws and crank shaft.

VI.

The said Supreme Court erred in holding on the undisputed facts of the case under the provisions of the Federal Employers' Liability Act that plaintiff in error was guilty of negligence.

ARGUMENT.

I.

Assignment of Error Numbered VI.

Defendant in error failed, on the undisputed facts, to establish negligence on the part of plaintiff in error.

Defendant in error claimed that plaintiff in error was negligent in not properly guarding the crank shaft, specifically that the guard hood of the crank shaft should have been longer and not open on the sides, and further that the set screws on the shaft should have been fitted with a rubber cap or covered. The photograph on page 6 of this brief is a front view of the engine and shows the guard hood and set screws. The set screws were set in from the passageway about 6 inches between the crank case and the side of the engine. A person walking in the passageway between the wall and the engine could not come in contact with the set screws unless he stepped into the open space between the crank case and the side of the engine. The crank shaft on the passageway side of the engine was protected by the guard hood here in question. This guard hood was a reasonable protection from accidents to a person in the passageway. The only way that an accident could happen to a person therein on account of the claimed inadequacy of the guard hood was for him to fall on to the guard hood or forward towards the guard hood so as to thrust his hand under the guard or beyond the guard into the crank shaft which is said to have happened in this case.

The sole evidence of the inadequacy of the hood and the lack of proper covering of the set screws is found in the testimony of the defendant in error and the witness Gust Scheline. Defendant in error testified:

> "that the covering over the crank shaft is what is known as a hood; that should have been extended a foot at least more than it was. It could have been extended more than that. The sides should have been covered with sheet iron. (R. p. 9.) The set screws could have been covered or protected by a rubber cap." (R. p. 11.)

Witness SCHELINE testified:

> It was "practical" to guard the crank shaft "first by making an extension of the so-called projection over the counterbalance or crank shaft extending back to the cylinder; next by putting some kind of guard on each side, covering up each side of the counterbalance by little bolts fastened to the face of the engine." (R. p. 34.)
>
> It was practical to guard the set screws "by a very simple way which we could have covered this (referring to the set screw). This could be covered up by putting a small piece of belting around it and wiring it on each side." (R. P. 35.)

On this testimony, in view of the use of the particular machine and the covering of the crank shaft protecting a person therefrom in the passageway, and the manner in which the set screws were set in from the passageway, and the fact that there were no hidden dangers connected with this machine, and the obvious condition of the machine and the long period of time that defendant in error had worked with it we fail to see wherein defendant in error has proved any negligence of plaintiff in error.

The master is not bound to see that his instrumentalities are absolutely safe and suitable nor to see that they are as safe as human skill and foresight can make them,

nor to provide appliances which make accidents impossible. He fulfills his duty to his employe when he provides machinery reasonably safe and suitable for the work being done.

Washington & Georgetown Ry. Co. v. McDade, 135 U. S. 554 (34 L. Ed. 235).

Catherine C. Reese, Administratrix of the Estate of Garrett Tracy Reese, deceased, v. Philadelphia & Reading Ry. Co. No. 608, October Term Supreme Court of the United States 1915, decided December 20, 1915.

It is difficult to see how plaintiff in error has violated any duty that it owed to defendant in error unless the standard of care required of the employer is to furnish not only reasonably safe machinery, but machinery that will be safe against all possible forms of accident. It cannot be said that the unguarded set screws were the cause of the accident, for defendant in error did not know whether he was caught on the set screws or precipitated into the machinery on account of the greasy condition of the floor. Even assuming negligence in failing to guard the set screws, such failure cannot be held to be a proximate cause of the accident.

Mississippi River Logging Co. v. Schneider, 74 Fed. 195, 200:

In that case it was contended that a certain sort of safeguard should have been furnished.

"It was not shown that the safeguard the want of which is complained of, was generally adopted by those in like business, and it will not answer to submit to a jury the question of negligence of the master upon opinions of experts stating what ought to have been

provided, and to charge one with negligence for failure to provide accordingly. * * * Jurors are not at liberty to charge a duty upon the master according to their own notions of what was proper under the circumstances nor upon the opinion of experts of what was desirable and prudent."

II.

ASSIGNMENTS OF ERROR NUMBERED I, II, III, IV AND V.

THE UNDISPUTED FACTS IN THIS CASE PRESENT A PARTICULARLY CLEAR CASE OF ASSUMPTION OF RISK AS THAT DEFENSE EXISTED AT COMMON LAW AND IS INTERPRETED BY THE FEDERAL COURTS.

If the crank shaft and set screws should have been guarded as contended for by defendant in error in this case this unguarded condition of the machinery was well known to him. For nine years he had operated this particular engine and pump, during which time the engine and pump had been in daily operation. He not only knew the alleged insufficiency of the guard hood and the lack of proper guards as claimed on the set screws, but qualified as an expert witness as to how these defects should have been remedied. At the time defendant in error entered the employment of plaintiff in error these conditions existed. The engine and pump were not changed during his employment. No man could have had a more perfect knowledge of the conditions that existed in the pump house than defendant in error. No new conditions existed on the day of the accident than had existed, as far as the evidence showed, during all the preceding years.

It is claimed that the floor of the passageway was greasy and slippery. It is not disputed that it was the sole duty of defendant in error to keep the floor clean and in a good safe condition. He had sole charge of the pump house and it was his sole duty to look after the machinery and keep the pump house clean. Defendant in error either slipped on the greasy floor and was precipitated against the partially guarded crank shaft or his coat was caught on the set screws and he was precipitated against the same. The cause of the accident was either of these two, he did not know which. He was a man of intelligence and experience. He necessarily knew that if he walked too close to the set screws his clothes might become entangled thereon. He also knew that if he slipped upon the floor and fell he might fall into the partially guarded crank shaft. The conditions that might cause such an accident were obvious and apparent to any man.

Assumption of Risk as Defined by this Court and the Federal Courts.

The doctrine of assumption of risk has been many times stated by this court and the statements thereof have been uniformly in accord with the doctrine as defined by Mr. Justice Day in Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 65, 68 (48 Law Ed. 96),

> "* * * where a defect is known to the employe, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection,

he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and, in such case, cannot recover."

Or, as was stated by Mr. Justice Moody in Butler v. Frazee, 211 U. S. 459, 466:

"One who understands and appreciates the permanent conditions of machinery, premises and the like and the danger which arises therefrom, or by the reasonable use of his senses, having in view his age, intelligence and experience, ought to have understood and appreciated them and voluntarily undertakes to work under those conditions and to expose himself to those dangers cannot recover against his employer for the resulting injuries."

Kirkpatrick v. St. L. & S. F. 159 Fed. 855, 858:

"If the risks and dangers which caused his (the servant's) death were the usual and ordinary risks of the dangers of his employment, he assumed them, provided they were known to and appreciated by him."

St. Louis Cordage Co. v. Miller, 126 Fed. 495, 508, and cases cited:

"A servant by entering or continuing in the employment of a master without complaint assumes the risks and dangers of the employment which he knows and appreciates, and also those which an ordinarily prudent person of his capacity and intelligence would have known and appreciated in his situation.

A servant who knows, or who by the exercise of reasonable prudence and care would have known, of the risks and dangers which arose during his service, but who continues in the employment without complaint, assumes those risks and dangers to the same extent that he undertakes to assume those existing when he enters upon the employment."

C. B. & Q. R. Co. v. Shalstrom, 195 Fed. 725, 728:

"Although the risk of the master's negligence and of its effect unknown to the servant is not one of the ordinary risks of the employment which he assumes,

> yet if the negligence of the master or its effect is known and appreciated by the servant, or is obvious, or 'so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence, and experience' and he enters and continues in the employment without objection, he elects to assume the risk of it, and he cannot recover for the damages it causes. (Cases cited.) When a defect is obvious or 'so patent as to be readily observed by a servant by the reasonable use of his senses, having in view his age, intelligence and experience,' and the danger and risk from it are apparent, he cannot be heard to say that he did not realize or appreciate them. (Cases cited.)"

The danger of injury from working on a greasy or slippery floor of being precipitated even "inadvertently" into unguarded machinery is a risk that the employe assumes. An employe is presumed to see and appreciate the dangers arising from such conditions.

Brown v. Hitritz, 192 Fed. 528. Held that plaintiff assumed the risk of being injured through his foot slipping on a slimy floor, causing his hand to be caught between unguarded revolving rolls of nearby machinery.

Cudahy Packing Company v. Marcan, 106 Fed. 645. Opinion by Jundge Sanborn. Plaintiff stood on a block on a slippery floor. The court said:

> "All these risks and dangers were so simple, open and obvious that the conclusion is inevitable that he impliedly contracted not only to work in this place, but also to assume the danger of accidents arising from the wet, greasy and slippery floor and the revolving cylinders of the chopping machine."

Murphy v. American Rubber Co. (Mass.) 34 N. E. 268. The floor was slippery from grease. Plaintiff knew this condition. He slipped on the oily floor and fell against

some unguarded machinery. Held that he assumed the risk.

Shea v. Kansas City Ft. S. T. S. & M. Ry. Co., 76 Mo. App. 29.

McIntire v. White, 171 Mass. 170.

Feely v. Pearson Cordage Co., 161 Mass. 426.

Storrs v. Michigan Starch Co., 126 Mich. 666.

Disano v. New England S. Brick Co., 20 R. I. 452.

Omaha Packing Co. v. Sanduski, 155 Fed. 897.

To the same effect see—

Balle v. Detroit Leather Co., 41 N. W. 216.

Goudie v. Foster, 202 Mass. 226, 88 N. E. 663.

Savenick v. Schwarzchild & Co., 125 S. W. 1192.

Schultz v. C .R. I. & P. Ry. Co., 129 S. W. 1051.

Wilson v. Chess & W. Co., 78 S. W. 453.

Rumely Co. v. Myer, 40 Ind. App. 450, 82 N. E. 97.

Steffen v. Illinois Steel Co., 40 Ill. App. 551.

Swift & Co. v. Campbell, 97 Ill. App. 360

Scharenbroich v. St. Cloud Fiberware Co., 59 Minn. 116.

In the last case above cited plaintiff was turning off the water in the mill when his foot slipped on the wet floor into some unguarded cogs. The Supreme Court of Minnesota held that plaintiff assumed the risk and denied a recovery. This was the law in Minnesota, in common with all other states of the Union, before the doctrine of assumption of risk was modified by the Supreme Court of that state on account of the statutory law requiring dangerous machinery to be covered.

An employe is presumed to understand and appreciate the risk of unguarded set screws, cog wheels, gearing and other revolving machinery and assumes the risk thereof.

Kyner v. Portland Gold Mining Company, 184 Fed. 43, 46. Decision by Mr. Justice Van Devanter. In this case plaintiff was injured while stepping over a moving cable. The court stated:

> "It conclusively appears that the absence of a guard about the drum and lower cable was so patent as to be readily observed; that the enhanced danger arising therefrom was so obvious that its appreciation by plaintiff was unavoidable, in view of his years, intelligence, and experience; and that under those conditions he voluntarily continued to work about the drum and cable. So, even if the absence of a guard was a negligent omission on the part of the defendant, the court was bound to rule, as a matter of law, that plaintiff assumed the risk incident thereto." (See cases cited.)
>
> Haines v. Spencer, 167 Fed. 266.

Glemont Lbr. Co. v. Ray, 126 Fed. 524, 528: This case involves an unguarded saw.

> "An employe cannot be held to say that he did not appreciate or realize the dangers while the defects were obvious and the dangers would have been known and appreciated by an ordinary prudent person of his intelligence and experience in his situation."

Citing Choctaw, O. & G. R. Co. v. McDade, 24 Sup. Ct. 24, 191 U. S. 65, 48 L. ed. 96.

See to the same effect the following cases wherein employes assumed the risk of unguarded set screws:

Higgins Carpet Co. v. O'Keefe, 79 Fed. 900.

Cudahy Packing Co. v. Marcan, 106 Fed. 645.

American Dredging Co. v. Walls, 84 Fed. 428.

St. Louis Cordage Co. v. Miller, 126 Fed. 495.

Kyner v. Portland Gold Mining Co., supra.

Ford v. Mt. Tom Sulphite Pulp Co., 52 N. E. 1065 (Mass.).

Connelly v. Hamilton Woolen Co., 39 N. E. 787 (Mass.).

Brown v. Tabor Mill Co., 60 Pac. 1126 (Wash.).

Archibald v. Cyglof Shoe Co., 71 N. E. 315 (Mass.).

See also cases cited to the same effect in Labatt's Master & Servant, Second Edition, Section 1313, page 3687.

Likewise defendant in error assumed the risk of the passageway being too narrow to get around the engine and if the accident happened as he testified, "had there been room enough to get around the engine I would not have been hurt," obviously if the cause of the accident is to be placed upon the narrowness of the passageway as he claims, then it is a risk which he assumed.

It is not necessary for an employe to appreciate the exact form in which an accident may occur.

Mississippi River Logging Co. v. Schneider, supra, at 201.

> "It is not necessary that a servant should be warned of every possible manner in which injury may occur. He must examine his surroundings and take notice of obvious dangers and the operation of familiar laws."

It is no defense to say that defendant in error did not appreciate the conditions, so as to realize that an accident might happen in the particular way in which this one occurred. If that be true as to him it is equally true as to his employer. The possibility was as obvious to the understanding of one as to the other. So in the case at bar the danger connected with the unguarded set screw, crank shaft and slippery floor was as apparent to the understanding of the employe as it was to the master and much more so to the employe in this case on account of his long experience in the pump house.

From the foregoing cited cases it is apparent that defendant in error is charged, as a matter of law, with an appreciation of the risks connected with walking upon a slippery floor and in close proximity to unguarded set screws.

Such is the defense of assumption of risk as it existed at common law and as applied by the federal courts and by this court to facts similar to those in the case at bar. The Supreme Court of the state of Minnesota refused in this case to so apply the doctrine of assumption of risk and held on the undisputed testimony that whether or not the defense of assumption of risk had been made out was a question of fact for the jury. This in conflict with not only all the decisions of the federal courts, but also in conflict, we believe, with the decisions of every other state court.

III.

The defense of assumption of risk was applied by the Supreme Court of the State of Minnesota to the facts of this case as that court had modified this defense when applied to cases arising under the Safety Appliance Acts of that state.

The Supreme Court of Minnesota in its opinion states:

> "We appreciate this to be a very close case upon the issue of assumption of risk, but believe it to come within such decisions as Blockner v. Hardwood Mfg. Co., 109 Minn. 30; Snyder v. Waldorf Box Board Co., 110 Minn. 40, and Falconer v. Sherwood, 118 Minn. 357." (R. P. 55.)

The Minnesota Supreme Court "appreciates" this to be a very "close case" upon the issue of assumption of risk.

That issue it believes, however, was controlled by the decisions cited. These decisions in each case, so that court states, were "under the statute" (referring to the Minnesota Safety Appliance Statute). Clearly decisions defining the doctrine of assumption of risk based upon the Minnesota Safety Appliance statute cannot be applicable to this case.

Snyder v. Waldorf Box Board Co., 110 Minn. 40, 42.

The court stated:

> "Where an accident occurs through unguarded machinery, which it is practicable to guard, and which is so located as to be dangerous to those employed around it, the statutory negligence of the master is established. He may show in defense * * * that the servant assumed the risk of injury from the unguarded machinery; but it is evident that if the employe is to be held to have assumed such risk in every case in which he knew or should have known of the lack of guards the statute would be practically nullified. * * * *We have no right to curtail the effect of the statute, but must assume that the legislature intended to insist upon a greater degree of care by the master than was required of him by the common law.*" (Italics ours.)
>
> The slippery condition of the plank upon which the plaintiff was standing is only important as accounting for his fall, and, while it may be true that he had an opportunity to observe the condition of the plank, it cannot be said that he was, as a matter of law, guilty of slipping because of its condition. * * * If in doing so he used the plank, placed there to be walked upon, and had when opposite the unguarded machinery slipped and fallen against it, it would be easy to understand that his contributory negligence and assumption of risk would *under the statute* be questions for the jury."

Blockner v. Hardwood Mfg. Co., 109 Minn. 30, 32. In this case the court did not discuss the doctrine of assumption of risk, but the state statute was involved.

> "Her(plaintiff's) account of the manner in which she was caught is very indefinite and unsatisfactory, but for the purposes of this appeal we shall assume that her negligence and the question of assumption of risk were for the jury."

Falconer v. Sherwood, 118 Minn. 357, 361. The negligence charged in this case was a violation of the Safety Appliance Act of the State of Minnesota. Justice Philip E. Brown in writing this decision of the court stated:

> "The writer, speaking for himself alone, is of the opinion that the alleged defense of assumption of risk has no application to this case, nor to any case where the plaintiff's right to recover is predicated upon the failure of the defendant to perform the statutory duty to guard dangerous machinery. This divergence of opinion, however, is immaterial in this case; for it is settled by the decisions of this court where a servant, lawfully in the vicinity of unguarded dangerous machinery, slips or loses his balance by some mishap, and is brought involuntarily in contact with such machinery while the same is in motion, and is injured thereby, the fact that he knew that the machinery was unguarded, and that he would be injured by such an ocurrence if it should happen does not establish, as a matter of law, that he either assumed the risk or was guilty of contributory negligence. Snyder v. Waldorf Box Board Co supra, and cases cited therein."

It is apparent that the decision of the Minnesota Supreme Court in these two cases was a modification of the defense of assumption of risk as it existed at common law and as the Minnesota court thought it should be modified on account of the Safety Appliance Acts of that state.

Under these decisions where a safety appliance act is violated the defense of assumption of risk is always a question of fact for the jury.

The decisions which the Minnesota court cited to sustain its position in the case at bar are decisions admitted by that court to be a modification of the common law doctrine of assumption of risk, and hence the defense of assumption of risk as it existed at common law and as interpreted by the Federal courts was denied to plaintiff in error.

IV.

The Supreme Court of the State of Minnesota confused the defense of assumption of risk and of contributory negligence.

The court states in its opinion:

> "Both causes (slipping on the floor or walking too close to the unguarded machinery) given for losing his balance may be referrable to plaintiff's negligence rather than to an assumption of known and appreciated dangers arising out of defendant's negligence." (R. P. 55.)

He assumed the risk of these conditions regardless of his care or want of care in respect thereto.

The distinction between these two defenses is clearly stated in Washington & Georgetown Ry. Co. v. McDade, 135 U. S. 554; also in St. Louis Cordage Co. v. Miller, 126 Fed. 495, 502:

> "The truth is that, while assumption of risk and contributory negligence both apply to prevent a recovery in cases in which the servant has knowingly and willingly exposed himself to dangers too imminent for prudent persons to incur, they are neither identical in effect or coincident in extent, and the latter has no application and constitutes no defense in that great majority of cases in which assumption or risk is an impregnable bar to a recovery where prudent persons assume the obvious dangers of their

> employments which are neither imminent nor great. Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability therefor. Contributory negligence is the causal action or omission of the servant without ordinary care of consequences. The one rests in contract, the other in tort. Contributory negligence is no element or attribute of assumption of risk. The latter does not prevail because the servant was or was not negligent in making his contract and exposing himself to the defect and danger which injured him, but because he voluntarily agreed to take the risk of them. No right of action in his favor in such a case can arise against the master, because the latter violates no duty in failing to protect the servant against the risks and dangers which the latter has voluntarily agreed to assume and to hold the former harmless from."

See also Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, in which case Mr. Justice Pitney clearly points out the distinction between contributory negligence and assumption of risk. In the case at bar plaintiff in error violated no duty which it owed to defendant in error for the reason that he had voluntarily assumed the risk connected with the absence of a proper guard, as claimed, on the crank shaft and the absence of proper guards, as claimed, for the set screws and the "too narrow passageway" between the wall and the engine. These were conditions that existed at the time he entered the employment of plaintiff in error, and by his contract of employment he assumed the risk therefrom. The greasy floor was a condition created by him alone. The master had no knowledge of that condition.

The record in this case can be searched in vain for any evidence that distinguishes it from the well established rules governing the defense of assumption of risk.

If assumption of risk by the servant is a defense still permitted to the master, that defense has been clearly established by the undisputed evidence in this case.

As was said by Judge Sanborn in the case of C. B. & Q. R. Co. v. Shalstrom, 195 Fed. 725, 729:

> "The agreement of the servant to assume the ordinary risks of his employment and the extraordinary risks thereof that are known to and appreciated by him inheres in and is an inextricable part of his contract of employment, and when that is proved or admitted the assumption of these risks is proved, and no further pleading or proof on the part of the defendant is necessary to establish it."

V.

Plaintiff in error in this case was entitled to a directed verdict.

C. B. & Q. R. R. Co. v. Shalstrom, supra, at page 730 and cases cited.

Cudahy Packing Co. v. Marcan, 106 Fed. 645, at page 648 and cases cited.

Such is the law in Minnesota where the evidence is undisputed.

Morse v. Minneapolis & St. Louis Ry. Co., 30 Minn. 465.

Manore v. Kilgore-Peteler Company, 107 Minn. 347.

Mattson v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 103 Minn. 239.

O'Neil v. Great Northern Ry. Co., 101 Minn. 467.

It is respectfully submitted that the record in this case conclusively establishes the defense of assumption of risk

and the absence of evidence tending to prove negligence on the part of the plaintiff in error.

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M. L. COUNTRYMAN and
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 690

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error.

vs.

O. B. KNAPP,
Defendant in Error.

In Error to the Supreme Court of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR UPON MOTION TO DISMISS, AFFIRM OR TRANSFER TO THE SUMMARY DOCKET.

E. C. LINDLEY,
Attorney for Plaintiff in Error.

M. L. COUNTRYMAN,
A. L. JANES,
Of Counsel.

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BRIEF FOR PLAINTIFF IN ERROR UPON MOTION TO DISMISS, AFFIRM OR TRANSFER TO THE SUMMARY DOCKET.

STATEMENT FOR PLAINTIFF IN ERROR.

This writ of error brings up for review by this court a judgment of the Supreme Court of the State of Minnesota

affirming the judgment of the District Court for Meeker County, Minnesota, in the sum of $10,000 and costs entered on a verdict in favor of defendant in error.

STATEMENT OF FACTS.

The facts in this case are undisputed. Defendant in error was the station agent of plaintiff in error at Dassel, Minnesota. As a part of his duties he had to attend the pump house some distance from the station once or twice a day and keep filled the water tank for locomotives. The water was pumped by means of a gasoline engine. The clutch on the engine was partially guarded. There were two protruding set screws on the main shaft. These were not guarded. In order to throw the clutch to start the pump defendant in error had to pass near the clutch and set screws. This passageway was narrow. He was in a hurry and claims that as he attempted to pass the clutch and set screws he lost his balance either through slipping upon the greasy floor or his coat was caught on the set screws and he was precipitated on to the crank shaft guard and his hand caught in the clutch and thereby cut off. Plaintiff in error offered no testimony at the trial of the case. With a few additions thereto the facts as stated by the Supreme Court of the state of Minnesota in its opinion are correct.

> "Plaintiff was the station agent at Dassel, Minnesota. He also had to attend the pump-house, some distance from the station, once or twice a day, so that the water tank for the locomotives was kept filled. * * * The pump and engine were in a small room. The fly-wheel of the engine was about 6 feet in diameter, leaving the horizontal shaft connecting with the pump about 3 feet from the floor. Upon this shaft was a clutch, by which the pump was set in motion.

and between the clutch near the fly-wheel were two protruding set screws. After starting the engine, which had to be done by turning the fly-wheel, plaintiff turned down some grease cups on the pump. These cups were between the pump and the rear wall of the building. In order to throw the clutch to start the pump plaintiff had to pass near the shaft mentioned. (And set screws.) He was in a hurry. * * *

Plaintiff had had charge of the running of the pumping outfit, not including the repairs thereon, for over eight years. He was of mature age, no doubt, of average intelligence."

The floor was greasy. It was the sole duty of defendant in error to look after and care for the engine, to keep the pump house neat and clean and keep the floor thereof in a proper condition and clean. The machinery in the pump house had not been changed during all the years that defendant in error was employed. He knew that the crank shaft was only partially protected by a guard and that the set screws in the shaft were unprotected. As stated by the trial court in its charge to the jury:

"It appears that plaintiff was an old and experienced employe of the defendant, that he had operated the engine and had entire control of its operation and the machinery connected therewith for about nine years continuously, during which time it had been in daily operation and in the same condition in which it was in at the time of the accident, * * * so far as appears, he (defendant in error) was in full charge of all the machinery in question and has full knowledge of its condition, and that he gave the same his personal attention, on the average once daily for about nine years, and during all that time the engine —the crank shaft and the set screws—remained in the same condition with respect to guards that it was in at the time of the accident, and he never at any time or in any way notified or informed the defendant or any of its officers or employees that its condition was in any way dangerous."

The accident happened, as stated by the Supreme Court of the State of Minnesota, in the following manner:

> "He was in a hurry, and claims that as he so attempted to pass (crank shaft and set screws) he lost his balance, either through a slip upon the greasy floor or a jerk by his coat being drawn into the flywheel or shaft, and in striking out to catch himself his hand and part of the arm came between the crank of the shaft and top of the hood."

Defendant in error, in describing how the accident happened, stated:

> "The accident is just as much of a mystery to me as to any one else, for I am absolutely unable to tell how it occurred. * * * It was all done so quick and so sudden that I could not realize what had been done. I had done nothing different than I had done hundreds of times before and ever since the accident I have been trying to figure out just how it was done but have not been able to do so."
>
> State fully how accident happened as far as you know:
>
> 1st. I had started the engine in the usual manner.
>
> 2nd. I was doing nothing out of regular routine work.
>
> 3rd. I am unable to tell how my arm was caught.
>
> 4th. *Had there been room enough to get around engine I would not have been hurt.*
>
> "As I started away from the pump I had not taken a step I don't think—I don't know just how exactly, but not more than a step, I felt something pulling at my coat, being jerked, I was being drawn over, over towards this crank shaft, one side of it was running—this was the side that was running, next to the engine. I was being pulled over that way, I apparently could not stop myself, I didn't see how I was going to stop myself. * * * I was pulled over in this shape (indicating) so there was no possible way. * * * When I was drawn towards that clutch I threw my hand forward to catch myself.
>
> Q. You say that you slipped on the floor?
>
> A. I saw that I either slipped or my coat, by the suction from the flywheel, was drawn into the clutch, I don't know which, it was either one of the two."

Defendant in error did not know exactly how the accident happened, whether he slipped on the floor and fell into the clutch or whether his coat was caught on the set screws and he was thereby thrown against the clutch, and as he testified "if there had been room enough to get around engine I would not have been hurt." The passageway was narrow.

ASSIGNMENTS OF ERROR RELIED ON IN THIS COURT.

I.

The Supreme Court of the State of Minnesota erred in affirming the judgment entered in the District Court in favor of defendant in error.

II.

The said Supreme Court erred in holding under the Federal Employers' Liability Act that on the undisputed facts of the case the right of the Defendant in Error to recover was not barred by the common law doctrine of assumption of risk.

III.

The said Supreme Court erred in failing to apply to the undisputed facts of the case under the Federal Employers' Liability Act the principles of the doctrine of assumption of risk as they existed at common law.

IV.

The said Supreme Court erred in not reversing the judgment of the trial court and in denying to plaintiff in error its rights under the Federal Employers' Liability Act.

V.

The said Supreme Court erred in failing to hold under the provisions of the Federal Employers' Liability Act that the defendant in error assumed the risk of being injured from the unguarded set screws and crank shaft.

VI.

The said Supreme Court erred in holding on the undisputed facts of the case under the provisions of the Federal Employers' Liability Act that plaintiff in error was guilty of negligence.

ARGUMENT.

THE MOTION OF DEFENDANT IN ERROR TO DISMISS THIS APPEAL FOR WANT OF JURISDICTION SHOULD BE DENIED.

Defendant in error in his complaint exclusively based his right to recover upon the Federal Employers' Liability Act.

The trial court in instructing the jury applied as the law of the case the Federal Employers' Liability Act. The Supreme Court of the State of Minnesota held that the action was brought under the Federal Employers' Liability Act. It was the contention of plaintiff in error, both in the trial court and in the Supreme Court of the State of Minnesota, that, as the uncontradicted evidence disclosed the defects to be so patent and plain and the dangers therefrom so apparent to a man of the intelligence of defendant in error, that his assumption of the risk was conclusively established and plaintiff in error was entitled to a directed verdict.

Pursuant to the practice in the state of Minnesota plaintiff in error at the close of all the testimony moved for a directed verdict upon the ground that on the undisputed evidence in the case it conclusively appeared, as a matter of law, that the injury received by defendant in error resulted from risks which he assumed as a part of his employment. This motion was denied.

Plaintiff in error, pursuant to the proper practice, assigned as error and claimed in the Supreme Court of the State of Minnesota that it was entitled therein to judgment upon the ground that on the admittedly undisputed facts the injury suffered by defendant in error resulted

from risks assumed as a part of his employment. This contention was denied by that court.

In this case is clearly invoked the right of plaintiff in error to be shielded from responsibility under the Federal Act because when the law of assumption of risk, as interpreted by this court and by the federal courts, is properly applied to the undisputed facts as testified to by defendant in error, no liability on its part from the statute would result.

It is the contention of plaintiff in error that the Supreme Court of the State of Minnesota failed to apply to the undisputed facts of this case the law of assumption of risk as it is applied by this court and by the federal courts.

The uniform construction of the Federal Employers' Liability Act throughout the several states of the Union requires this court to take jurisdiction in all cases where it is claimed that the state courts fail to apply to the act the common law as interpreted by this court and the federal courts, especially as in this case where the facts are undisputed and where the judgment of the state court necessarily rests upon the proper application and interpretation of the general common law as interpreted by the federal courts.

In Seaboard Air Line v. Duvall, 225 U. S. (56 Law Ed.) page 477, Mr. Justice Lurton stated this proposition:

> "* * * in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the union."

Central Vermont Railway Company v. White, 35 Sup. Ct. Rep. 865, 868. Referring to the enforcement of the

common law under the Federal Employers' Liability Act, this court said:

> "Congress, in passing the Federal Employers' Liability Act, evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts."

Yazoo & Miss. Valley R. R. Co. v. Wright, 235 U. S. 376. In this case the action was brought under the Federal Employers' Liability Act. Mr. Chief Justice White stated:

> "While this second appeal rests on the Employers' Liability Act there is no contention as to its meaning, hence we need only determine whether plain error was committed in relation to the principles of general law involved."

In this case the court reviewed the question whether or not the law of assumption of risk had been properly applied by the trial court.

Seaboard Air Line Ry. v. James T. Horton, 233 U. S. (Law Ed.) 1062. In this case this court refused to dismiss the appeal upon the ground that the assignments of error not only presented questions involving directly the construction of the Federal statute, but also involving a proper construction of the common law.

Gila Valley Globe & Northern R. Co. v. Hall, 232 U. S. (Law Ed.) 521.

North Carolina R. Co. v. Zachary, 232 U. S. (Law Ed.) 591.

Seaboard Air Line R. Co. v. Duvall, supra.

St. Louis I. M. & S. R. Co. v. Taylor, 210 U. S. (Law Ed.) 1061.

Southern Ry. Co. v. Crockett, 234 U. S. (Law Ed.) 1564.

St. Louis I. M. & S. R. Co. v. McWhirter, 229 U. S. (Law Ed.) 1179. In this case the sole question presented was whether or not the violation of the Federal hours of service Act was the proximate cause of plaintiff's injury. The court reviewed the whole evidence and held that a federal question was presented, and stated:

> "While it is true, as we have said, that coming from a state court, the power to review is controlled by Revised Statutes, Section 709, yet where, in a controversy of a purely federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling when duly excepted to, is reviewable, because inherently involving the operation and effect of the federal law."

Under the decisions here cited this court, on an appeal from the judgment of the Supreme Court of the State of Minnesota, can review the evidence and law as applied by the trial court and the Supreme Court of Minnesota, to ascertain whether or not those courts properly applied the defense of assumption of risk as it is applied and interpreted by this court and the federal courts of the Union.

That the Supreme Court of the State of Minnesota entirely misunderstood the defense of assumption of risk as it existed at common law and as interpreted by the Federal Courts is clearly established by the following statements from the opinion of that court:

> "*Had he (defendant in error) been caught on the set screws or got his hand between the guard and crank while working over, or with, the shaft, the legal inference might be conclusive that the risk incident thereto was assumed by him.* But he had just turned some grease cups on the rear of the pump and started to go to the front of the engine to throw the clutch in gear. In so doing it is easy to understand how the jury could find that in his hurry he either slipped on

> the greasy floor or inadvertently or negligently came too near the shaft or fly-wheel. It does not much matter which, because the jury could well say neither came within the risks understood and appreciated by plaintiff. That it was an involuntary and unforseen mishap. Both causes given for losing his balance may be referable to plaintiff's negligence rather than to an assumption of known and appreciated dangers arising out of defendant's negligence. We appreciate this to be a very close case upon the issue of assumption of risk."

If defendant in error had been injured while standing near the crank shaft and in working in and about the crank shaft, the Supreme Court of the State of Minnesota said "that it might be conclusive" that he assumed the risk of the unguarded crank shaft and set screw. It follows, therefore, from this statement of the court that defendant in error fully knew and appreciated the risks connected with the unguarded set screw and crank shaft, but the court says he was not working over the unguarded parts of the machine, but was compelled to walk by these unguarded parts in the performance of his duty, and hence did not assume the risk therefrom as a matter of law.

In other words, if he stood too close to the machine while working over it he would appreciate the danger and could not recover, but if he walked too close to it in the performance of his work, but not working directly over the machine he would not be held to appreciate the danger as a matter of law. If the employe in this case can be said to have assumed the risk if injured while working over the unguarded machinery, for what logical reason can it be said that he did not assume the risk of coming in contact with this unguarded machinery when he walked too close to it or fell into it, if he slipped on the floor?

If the set screw and crank shaft were not properly guarded defendant in error knew and appreciated the dangers therefrom as the Supreme Court of the State of Minnesota has stated. That court, however, says it is a question of fact whether or not he appreciated the danger of walking too close to the machine. This despite the fact that defendant in error for years had known the condition of the machinery and being a man of intelligence necessarily knew that if he got too close to the machine he might be caught thereon. The floor was greasy and slippery. This condition of the floor was due to plaintiff's failure to perform his duty. There is nothing to show that plaintiff in error knew that the floor was greasy, or that it was in an unsafe condition, or ever had had an opportunity to clean the same. That was the sole duty of defendant in error. The Supreme Court of the state of Minnesota says that it is a question of fact for a jury whether or not defendant in error appreciated the risk of walking on a slippery floor and that he might thereby be precipitated into the unguarded machinery. This despite the fact that the condition of the floor was one of his own creation, of which he had sole knowledge, and being a man of intelligence certainly must have known that if he slipped on the floor he might go into the machinery. Under the facts in this case and within the decisions of this court and the federal courts defendant in error must be held to have assumed the risk arising from the slippery condition of the floor and the risk arising from the unguarded machinery.

Assumption of Risk as Defined By This Court and the Federal Courts.

The doctrine of assumption of risk has been many times stated by this court and the statements thereof have been uniformly in accord with the doctrine as defined by Mr. Justice Day in Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 65, 68 (48 Law Ed. 96),

> "* * * where a defect is known to the employe, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and, in such case, cannot recover."

Or, as was stated by Mr. Justice Moody in Butler v. Frazee, 211 U. S. 459, 466:

> "One who understands and appreciates the permanent conditions of machinery, premises and the like and the danger which arises therefrom, or by the reasonable use of his senses, having in view his age, intelligence and experience, ought to have understood and appreciated them and voluntarily undertakes to work under those conditions and to expose himself to those dangers cannot recover against his employer for the resulting injuries."

Kirkpatrick v. St. L. & S. F. 159 Fed. 855, 858:

> "If the risks and dangers which caused his (the servant's) death were the usual and ordinary risks of the dangers of his employment, he assumed them, provided they were known to and appreciated by him."

St. Louis Cordage Co. v. Miller, 126 Fed. 495, at page 508, and cases cited:

> "A servant by entering or continuing in the employment of a master without complaint assumes the risks and dangers of the employment which he knows and appreciates, and also those which an ordinarily prudent person of his capacity and intelligence would have known and appreciated in his situation.
>
> A servant who knows, or who by the exercise of reasonable prudence and care would have known, of the risks and dangers which arose during his service, but who continues in the employment without complaint, assumes those risks and dangers to the same extent that he undertakes to assume those existing when he enters upon the employment."

C. B. & Q. R. Co. v. Shalstrom, 195 Fed. 725 to 728:

> "Although the risk of the master's negligence and of its effect unknown to the servant is not one of the ordinary risks of the employment which he assumes, yet if the negligence of the master or its effect is known and appreciated by the servant, or is obvious, or 'so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence, and experience' and he enters and continues in the employment without objection, he elects to assume the risk of it, and he cannot recover for the damages it causes. (Cases cited.) When a defect is obvious or 'so patent as to be readily observed by a servant by the reasonable use of his senses, having in view his age, intelligence and experience,' and the danger and risk from it are apparent, he cannot be heard to say that he did not realize or appreciate them. (Cases cited.)"

The danger of injury from working on a greasy or slippery floor and of being precipitated into unguarded machinery is a risk that the employe assumes.

Cudahy Packing Co. v. Marcan, 106 Fed. 645. Opinion written by Judge Sanborn. In this case plaintiff was pre-

cipitated into some unguarded machinery by slipping on the floor. His hand 'inadvertently came in contact with the machinery." The court (p. 647) said:

> "If, as he (referring to plaintiff) walked along the floor, he had slipped and fallen, could he have recovered of plaintiff in error? The question is susceptible of but one true answer. But he was as familiar with the danger that the block would slip as he was with the risk of the slipping of his feet. He, and he alone, had handled, placed and replaced the block during the four weeks that he had occupied it as his standing ground. He knew that, if his fingers fell into the hasher, they would be injured, perhaps destroyed. All these risks and dangers were so simple, open, obvious, that the conclusion is inevitable that he impliedly contracted not only to work in this place, but also to assume the danger of accidents arising from the wet, greasy, and slippery floor, and the revolving cylinders of the chopping machine."

To the same effect see—

Balle v. Detroit Leather Co., 41 N. W. 216.

Goudie v. Foster, 202 Mass. 226, 88 N. E. 663.

Savenick v. Schwarzchild & Co., 125 S. W. 1192.

Schultz v. C. R. I. & P. Ry. Co., 129 S. W. 1051.

Wilson v. Chess & W. Co., 78 S. W. 453.

Rumely Co. v. Myer, 40 Ind. App. 450, 82 N. E. 97.

Steffen v. Illinois Steel Co., 40 Ill. App. 551.

Swift & Co. v. Campbell, 97 Ill. App. 360.

Kyner v. Portland Gold Mining Company, 184 Fed. 43. Decision by Mr. Justice Van Devanter. In this case plaintiff was injured while stepping over a moving cable. The court stated:

> "It conclusively appears that the absence of a guard about the drum and lower cable was so patent as to be readily observed; that the enhanced danger arising therefrom was so obvious that its appreciation by

> plaintiff was unavoidable, in view of his years, intelligence, and experience; and that under those conditions he voluntarily continued to work about the drum and cable. So, even if the absence of a guard was a negligent omission on the part of the defendant, the court was bound to rule, as a matter of law, that plaintiff assumed the risk incident thereto." (See cases cited.)

An employe assumes the risk of unguarded set screws in a revolving crank shaft and of walking too near the same.

Higgins Carpet Co. v. O'Keefe, 79 Fed. 900.

Cudahy Packing Co. v. Marcan, 106 Fed. 645.

American Dredging Co. v. Walls, 84 Fed. 428.

St. Louis Cordage Co. v. Miller, 126 Fed. 495.

Kyner v. Portland Gold Mining Co., supra.

Ford v. Mt. Tom Sulphite Pulp Co., 52 N. E. 1065 (Mass.).

Connelly v. Hamilton Woolen Co., 39 N. E. 787 (Mass.).

Brown v. Tabor Mill Co., 60 Pac. 1126 (Wash.).

Archibald v. Cyglof Shoe Co., 71 N. E. 315 (Mass.).

We confidently assert that in the books there cannot be found a single case sustaining the proposition that if the accident was occasioned from exposed set screws or from walking too close to the same defendant in error did not assume such risk.

The Supreme Court of the state of Minnesota confused the defense of assumption of risk and of contributory negligence. It states:

> "Both causes (slipping on the floor or walking too close to the unguarded machinery) given for losing

> his balance may be referable to plaintiff's negligence rather than to an assumption of known and appreciated dangers arising out of defendant's negligence."

Even though it may be true that defendant in error was guilty of contributory negligence in failing to use due care when walking on the slippery floor or in failing to use care when walking by the unguarded machinery, such facts do not in any manner effect the defense of assumption of risk. The sole question is: Did defendant in error appreciate the danger of walking on a slippery floor or walking too close to the unguarded machinery?

The distinction between these two defenses is clearly stated in Washington Ry. Co. v. McDade, 135 U. S. 554; also in St. Louis Cordage Co. v. Miller, 126 Fed. 495, 502:

> "The truth is that, while assumption of risk and contributory negligence both apply to prevent a recovery in cases in which the servant has knowingly and willingly exposed himself to dangers too imminent for prudent persons to incur, they are neither identical in effect or coincident in extent, and the latter has no application and constitutes no defense in that great majority of cases in which assumption or risk is an impregnable bar to a recovery where prudent persons assume the obvious dangers of their employments which are neither imminent nor great. Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability therefor. Contributory negligence is the causal action or omission of the servant without ordinary care of consequences. The one rests in contract, the other in tort. Contributory negligence is no element or attribute of assumption of risk. The latter does not prevail because the servant was or was not negligent in making his contract and in exposing himself to the defect and danger which injured him, but because he voluntarily agreed to take the risk of them. No right of action in his

favor in such a case can arise against the master, because the latter violates no duty in failing to protect the servant against the risks and dangers which the latter has voluntarily agreed to assume and to hold the former harmless from."

Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, 58 Law Ed. 1063 at page 1070. Mr. Justice Pitman clearly points out the distinction between contributory negligence and assumption of risk.

The record in this case can be searched in vain for any evidence that may withdraw it from the operation of these rules. The facts are undisputed that defendant in error was a man of at least ordinary intelligence and was fully conversant with the fact that the machinery was unguarded. He himself qualified as an expert as to how the machinery should have been guarded and further was conversant with the fact that the floor was slippery. He certainly knew that if he got too close to the machine he would be drawn into the machine or if he slipped upon the floor that he might fall into the machine. These facts were most obvious and apparent to any man. The risk and danger from these conditions was apparent and there can be no escape from the conclusion that he assumed this risk and hence there was no question of fact for the jury.

Where the uncontradicted evidence discloses the fact that the defects in the place, structure or appliances were so patent as to be readily observed by plaintiff by the reasonable use of his senses, having in view his age, intelligence and experience and the risks and dangers from them were apparent and he entered upon or continued in the service without complaint, his assumption of the risk is conclusively established and the court should instruct the jury to return a verdict for the defendant.

C. B. & Q. R. Co. v. Shalstrom, supra, at page 730, and cases cited.

Cudahy Packing Co. v. Marcan, 106 Fed. 645, at page 648, and cases cited.

Morse v. Minneapolis & St. Louis Ry. Co., 30 Minn. 465.

Manore v. Kilgore-Peteler Company, 107 Minn. 347.

Mattson v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 103 Minn. 239.

O'Neil v. Great Northern Ry. Co., 101 Minn. 467.

The defense of assumption of risk was applied by the Supreme Court of the State of Minnesota to the facts of this case as that court had modified this defense when applied to cases arising under the Safety Appliance Acts of that state.

The Supreme Court in its opinion states

"we appreciate this to be a very close case upon the issue of assumption of risk, but believe it to come within such decisions as Blockner v. Hardwood Mfg. Co., 109 Minn. 30, Snyder v. Waldorf Box Board Co., 110 Minn. 40, and Falconer v. Sherwood, 118 Minn. 357."

Snyder v. Waldorf Box Board Co., supra.

The court stated:

"Where an accident occurs through unguarded machinery, which it is practicable to guard, and which is so located as to be dangerous to those employed around it, the statutory negligence of the master is established. He may show in defense * * * that the servant assumed the risk of injury from the unguarded machinery; but it is evident that if the employe is to be held to have assumed such risk in every case in which he knew or should have known of the lack of guards the statute would be practically nulli-

fied. * * * We have no right to curtail the effect of the statute, but must assume that the legislature intended to insist upon a greater degree of care by the master than was required of him by the common law."

"The slippery condition of the plank upon which the plaintiff was standing is only important as accounting for his fall, and, while it may be true that he had an opportunity to observe the condition of the plank, it cannot be said that he was, as a matter of law, guilty of slipping because of its condition. * * * If in doing so he used the plank, placed there to be walked upon, and had when opposite the unguarded machinery slipped and fallen against it, it would be easy to understand that his contributory negligence and assumption of risk would *under the statute* be questions for the jury."

Blockner v. Hardwood Mfg. Co., 109 Minn. 30. In this case the court did not discuss the doctrine of assumption of risk.

"Her (plaintiff's) account of the manner in which she was caught is very indefinite and unsatisfactory, but for the purposes of this appeal we shall assume that her negligence and the question of assumption of risk were for the jury."

Falconer v. Sherwood, 118 Minn. 357. The negligence charged in this case was a violation of the Safety Appliance Act of the State of Minnesota. Justice Philip E. Brown in writing the decision of the court stated:

"The writer, speaking for himself alone, is of the opinion that the alleged defense of assumption of risk has no application to this case, nor to any case where the plaintiff's right to recover is predicated upon the failure of the defendant to perform the statutory duty to guard dangerous machinery. This divergence of opinion, however, from the established doctrine of this court, is immaterial in this case; for it is settled by the decisions of this court where a servant, lawfully in the vicinity of unguarded dangerous machinery, slips or loses his balance by some mishap, and is

> brought involuntarily in contact with such machinery while the same is in motion, and is injured thereby, the fact that he knew that the machinery was unguarded, and that he would be injured by such an occurrence if it should happen does not establish, as a matter of law, that he either assumed the risk or was guilty of contributory negligence. Snyder v. Waldorf Box Board Co., supra, and cases cited therein."

It is apparent that the decision of the Minnesota Supreme Court in these two cases was a modification of the defense of assumption of risk as it existed at common law and as the Minnesota court thought it should be modified on account of the Safety Appliance Acts of that state.

Under these decisions where a safety appliance act is violated the defense of assumption of risk is always a question of fact for the jury.

The decisions which the Minnesota court cited to sustain its position in the case at bar are decisions admitted by that court to be a modification of the common law doctrine of assumption of risk, and hence the defense of assumption of risk as it existed at common law and as interpreted by the Federal courts was denied to Plaintiff in Error.

By this writ of error we have in good faith intended to present to this court the question as to whether or not the Supreme Court of the State of Minnesota properly interpreted and applied to the undisputed facts of this case the defense of assumption of risk as it has been interpreted and applied by this court and the federal courts of the Union.

It is respectfully submitted that plaintiff in error is entitled to a hearing upon this important question.

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M. L. COUNTRYMAN,
A. L. JANES,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 690

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

O. B. KNAPP,
Defendant in Error.

In Error to the Supreme Court of the State of Minnesota

Brief of Defendant in Error

STATEMENT OF FACTS

(Figures in parenthesis refer to Record pages.)

This is a personal injury action based upon the Federal Employer's Liability Law, it having been admitted on the trial that Plaintiff in Error was an Interstate Carrier and that Defendant in Error was employed by such carrier in Intertsate Commerce at the time of his injury.

The Federal Employer's Liability Law, being the Act of April 22nd, 1908, Chapter 149, Stat. L. 65, 1909 Supp. Fed. Stat. Ann. 584, so far as here material, reads as follows:

(Sec. 1.) (Liability of Railroads for Injuries to Employees.) That every common carrier by railroad while engaging in commerce between any of the several States and Territories, or between any of the States and Territories, or between the District of Columbia and any of the States and Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such Carrier in such Commerce, or, in case of the death of such employee, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then of the next kin dependant upon such employee, for such injury resulting **in whole or in part** from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, **due to its negligence,** in its cars, engines, appliances, machinery, track road-bed, works, boats, wharves, or other equipment."

This Statute supercedes all State Statutes relative to dangerous or unguarded machinery and under this Statute the sole question is whether or not the common law duty of the defendant to the plaintiff has been violated.

Seaboard Air Line Company vs. Horton, 233 U. S. 492, 58 L. ed. 1062.....S. C.....

The action was tried before the Court and a jury in Meeker County, Minnesota, resulting in a verdict in favor of the plaintiff in the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars, which, upon motion

of the Plaintiff in Error, was reduced by the trial Court to Ten Thousand ($10,000.00) Dollars.

Plaintiff in Error appealed from the Order of the Trial Court denying its Motion for Judgment Notwithstanding the Verdict, and, upon said appeal, the Supreme Court of the State of Minnesota unanimously affirmed the action of the trial Court.

The action is based upon the negligence of the Plaintiff in Error in failing to properly guard dangerous machinery in its pump-house in the Village of Dassel, Meeker County, Minnesota.

Defendant in Error claims liability in this action by reason of the negligence of Plaintiff in Error in failing to properly guard such machinery, when Defendant in Error, while not working about the machinery which was improperly guarded, **through an involtary act** on his part was thrown against certain exposed set screws on the shaft operating the flywheel and while he was attempting to prevent himself from falling into the machinery, he threw his arm forward and the same came in contact with the improperly guarded crankshaft, resulting in the loss of his arm.

The Defendant in Error was a station agent of Plaintiff in Error and in connection with his general duties as station agent he attended to the pump-house used to pump water for the engines of the railroad company.

The Pumping Station in question is run by a gasoline engine, is located in a building near the depot in Dassel, the building being small, about twelve (12) feet by fourteen (14) feet, the inside measurements being about one foot less than these figures.

Testimony was introduced in behalf of the Plaintiff

(*Defendant in Error here*) to show the dangerous condition of the pumping machinery and expert testimony was introduced showing the feasibility and practicability of guarding the dangerous machinery at a very slight cost.

The Railroad Company introduced no testimony whatever to either contradict or oppose the contention that the machinery was dangerous or that it could have been guarded without interfering with the working thereof.

On the machine in question there was a crank-shaft which was unguarded. It was practicable to have guarded this machinery and the fact that it was dangerous and could have been guarded was not disputed by Defendant. (11) (34–36).

In addition to the unguarded crank-shaft, there was a "clutch" forming a part of this machinery and this clutch was unguarded.

It was feasible to guard the same and the fact that it was feasible to guard the same was not controverted at the trial.

The Defendant in Error had charge of the machinery for **general purposes** but did not have charge of the same for the purpose of **making repairs** thereon.

At the time of his injury he was not working at or about the machinery which injured him, but, after having turned some oil cups upon the pump in said engine house he was in the act of passing between the pump and the engine when his coat became caught upon some unguarded set-screws and he was drawn toward the revolving engine, and, in throwing his hand forward to protect himself his arm was taken off by reason of coming in contact with the unguarded crank-shaft.

The negligence of the Plaintiff in Error is conclusive in this case.

As said by the Supreme Court of the State of Minnesota:

"The evidence is very clear that it was practicable and feasible to have guarded the set-screws and crank-shaft so as to fully protect from danger those who had to pass by."

The facts in the present case as found by the Supreme Court of the State of Minnesota are not subject to dispute.

"Plaintiff was a station agent at Dassel, Minnesota. He also had to attend the pump-house, some distance from the station, once or twice a day, so that the water tank for the locomotives was kept filled. The water was supplied by means of a triple pump operated by a gasoline engine. The pump and engine were in a small room. The fly-wheel of the engine was about six feet in diameter, leaving the horizontal shaft connecting with the pump about three feet from the floor. Upon this shaft was the clutch by which the pump was set in motion, and between the clutch and the crank near the fly-wheel were two protruding set screws. After starting the engine, which had to be done by turning the fly-wheel, Plaintiff turned down some grease cups on the pump. These cups were between the pump and the rear wall of the building. In order to throw the clutch to start the pump Plaintiff had to pass near the shaft mentioned. He was in a hurry and claims that as he so attempted to pass he lost his balance, either through a slip upon the greasy floor or a jerk by his coat being drawn into the fly-wheel or shaft, and in striking out to catch himself his hand and part of the arm came between the crank of the shaft and top of the hood which partially, but inadequately guarded it. The crank re-

volved towards the top of this guard. Plaintiff says his arm was cut off so quickly that he did not know it was gone until he saw the blood spurt from the stump. **The evidence is very clear that it was practicable and feasible to have guarded the set screws and crank so as to fully protect from danger those who had to pass by."**

Knapp vs. Great Northern Ry Co., 130 Minn. 405; 153 N. W. 848.

In addition to the facts stated in the foregoing opinion we wish to call the Court's attention to certain facts appearing in the Record:

NOTHING TO DO WITH THE REPAIR OF MACHINERY

It appeared from the evidence that Knapp had worked about the particular machinery for about nine years and had general charge thereof, but that he had nothing to do with any repairing or alteration of the machinery. When such repairs were to be made, or when there were to be any changes, these changes were made by someone else and not by Defendant in Error (29). The duties of Defendant in Error were "simply running the engine, nothing to do with the repairs." (29)

NOT WORKING ABOUT MACHINERY AT TIME OF INJURY.

Although it appears from the statement of facts as given by the Minnesota Supreme Court, that the plaintiff, (*Defendant in Error*) was not working about

the particular portion of the machinery which injured him, we desire to call attention to certain portions of the testimony showing the nature of the work being done just prior to the accident.

The version of the accident as given by Defendant in Error is as follows:

> "*Q.* Did you go down there to the pump house on the 12th?
>
> *A.* Yes, sir.
>
> *Q.* What for?
>
> *A.* To start the engine.
>
> *Q.* When you went down there, turn to the jury and tell them just what you did?
>
> *A.* I went, of course, first to the door, unlocked the door, the door was locked as we usually kept it locked. I walked into the house and around to my right between the wall and the engine and pumped up the gasoline, which we had to do to prime the engine before starting, that was my first duty, that I did; then I walked around the back of the engine, that would be on the east side of the engine and there is two oil cups that oil the main shaft, one on either side of the crank-shaft. I raised the lids of these and took the oil out of the pail that stood underneath in which we had a cup; I took the oil out and filled those two cups before starting the engine; I then reached over the battery that turned the current on, which was immediately back of that on the wall, I went to that and turned the current on and then

came back to the wheel, the large fly-wheel, a wheel that is nearly six feet in diameter, which we had to start. I had to get on it with my foot and take hold of the upper spokes in order to start it. I generally had to turn it probably two or three times around before the gasoline would explode. I turned it until I got the first explosion.

Q. Had you oiled the engine before starting it?

A. Yes, I had oiled the only place on the engine we did oil.

Q. **Then you had nothing more to do with the engine?**

A. **Nothing more to do with the engine.**

Q. Then where did you go?

A. After starting the engine we usually have to wait a moment or so for the engine to get speed enough to start the pump to get it started off at once. While I was waiting for that I walked back around the wheel that was going and went to the pump, which was not in motion, was standing still. The pump is a triple pump, three pumps in a line. These bearings that are just above them have hard oil cups, those are filled with hard oil. In starting or just before starting I usually turn them up so as to pass the oil through onto the bearings. That is, I turned three of those up, that wasn't running. * * *

Q. **When you got through, as you**

were turning the oil cups on the pump was the pump in motion or not?

A. **No, sir.**

Q. Then what did you do?

A. I was standing in this position, right this way (indicating) with my right hand here, with my left turning up those oil cups, and started to walk around the wheel, here was the large fly-wheel here.

Q. Was the clutch that is shown on exhibits "C" and "D" as you stood there to re-fill the oil cups, was the clutch and crank-shaft to your right or left, as you stood there?

A. As I stood there it was to my left.

Q. You were between this clutch and pump?

A. Rather right in front of the pump.

Q. Then, proceed and tell the jury what occurred then?

A. As I started away from the pump (this is the pump here) I had not taken a step I don't think—I don't know just how exactly, but not more than a step. I felt something pulling at my coat, being jerked. I was being drawn over.

Q. Over towards what?

A. Over towards the clutch, towards

this crank-shaft, one side of it was running; this was the side that was running, next to the engine. I was being pulled over that way. I apparently could not stop myself—I didn't see how I was going to stop myself. * * *

Q. State what you did?

A. **When I was drawn towards that clutch I threw my hand forward to catch myself.**

Q. **Forwards towards what?**

A. **Towards this hood that covers the crank-shaft.**

Q. **Then what happened?**

A. **My arm was taken off, that was all.**

Q. **What was it that took your arm off, what part of the engine was it?**

A. **It was the crank-shaft.**

Q. **The crank-shaft over which this hood partially goes?**

A. **Yes, sir.** * * * * (8)

Q. **Tell the jury what happened to you when you turned as to losing your balance or not?**

Defendant makes the same objection.
Objection overruled.

A. **I lost my balance, yes, sir.**

Q. Do you know what the condition of the floor there is as to being greasy or not?

A. Yes, it was greasy.

Q. Are you able to tell at this time what caused you to lose your balance, the greasy floor or being caught in this clutch?

Defendant objects as leading.
Objection overruled.

A. No, sir.

Q. **You are able to tell whether it is one or the other?**

Defendant objects as leading, it may have been other causes, he limits it to those two causes.
Objection overruled.

A. **Yes, it was one of those two causes.**

Q. This clutch and the bolt upon it, did the bolt extend forward as shown on exhibit "C", the bolt which you say caught your coat on the clutch?

A. Yes, sir.

Q. Have you any other reason which you can give to the jury why your coat caught there, otherwise than slipping?

Defendant objects as calling for a conclusion and leading the witness.

Q. Can you give the jury any other facts which, in your judgment, might have caused your coat to become caught there?

A. Yes, sir.

Q. Tell the jury?

A. It is possible—

Defendant objects to the witness telling what was possible.

Q. State whether there was any draft made that could have drawn your coat in there?

A. It is possible that the draft from the fly-wheel might have drawn my coat as it was loose at that time and might have caught my pocket or some part of the coat." (8–9)

NOT WORKING NEAR MACHINERY.

"*Q.* **At the time you were injured you may state to the jury whether or not you were working in connection with the engine in any way?**

A. No, sir, I was not." (10)

The testimony as given above is all of the material testimony of Knapp as to the happening of the accident. He does testify on cross-examination but his testimony is simply a reiteration of the testimony given on his direct examination and no additional facts are brought out.

We have quoted the testimony quite fully for the purpose of making it clear to the Court that **at the time of the injury Mr. Knapp was not doing any work about any particular portion of the machinery in the pump-house, and that he was injured by reason of coming involuntarily in contact with the fly-wheel and the set screws thereon and being thrown onto the unguarded crank-shaft,** by means of which his right arm was torn off.

NO KNOWLEDGE OF LIKELIHOOD OF INJURY SHOWN.

There is nothing in the Record even tending to show that Knapp had any knowledge, or should have had any knowledge, that he was likely to be injured by working about the machinery in question.

The only testimony bearing on the point is the following:

> "*Q.* You had worked there in the vicinity of this clutch and this pump and engine for several years?
>
> *A.* Yes, sir.
>
> *Q.* And never been injured?
>
> *A.* No, sir." (10)

Following this the question was asked:

"*Q.* I will ask you if you had any idea or any thought that there was any chance of being injured while you were working there?" (10)

The question just quoted was objected to by Defendant as calling for a conclusion of the witness and the objection was sustained.

Aside from the above **there is nothing in the Record bearing on the question of the knowledge of Plaintiff of any likelihood of injury to him; nothing to show that he understood or appreciated the risks to which he was exposed and that he "agreed" to assume them.**

The facts are very simple, involving the plain question of whether or not there can arise an assumption of risk where a servant involuntarily comes in contact with dangerous machinery; where the Record does not show that he knew the same was dangerous and does not show that he understood or appreciated the risks to which he was exposed.

NEGLIGENCE OF PLAINTIFF IN ERROR

On the question of the negligence of the company the evidence shows that it was feasible and practicable to guard the machine in question.

The Defendant in Error called an expert machinist, Gust Scheline, (33) and his testimony was to the effect that the machinery was dangerous and could have been guarded, at a slight cost, so as to have made the same safe for workmen in the vicinity thereof.

Aside from the testimony of this expert and the

testimony of one McGraw, that he found the coat of Knapp wrapped around the crank-shaft, there was no evidence introduced in the case.

CHARGE OF THE COURT.

The Trial Court submitted to the jury the question of Assumption of Risk, and also submitted to them the question of Contributory Negligence under the Comparative Negligence Doctrine.

The jury found for the Plaintiff and by their general verdict, found that there was no assumption of risk and they presumably applied the doctrine of comparative negligence as given to them by the Court.

The Trial Court instructed the jury on the question of assumption of risk, as follows:

"It is the law that a person who undertakes any employment assumes all the risks incident to that employment which are open, obvious and discoverable by ordinary observation, and this applies to the place where the work is performed as well as to the machinery.

It appears that the plaintiff was an old and experienced employee of the defendant, that he had operated the engine and had entire control of its operation and the machinery connected therewith for about nine years continuously, during which time it had been in daily operation and in the same condition in which it was at the time of the accident, and he was bound to know and appreciate all the dangers attending the operation of the engine in the place where it was located and in the condition in which it was as he operated it, which an ordinarily prudent man possessed of ordinary intelligence and common sense and having the knowledge and experience of

the plaintiff would know and appreciate, and if he sustained his injury in consequence of being exposed to a danger which he knew and appreciated or from his own knowledge, experience and observation, **ought to have known and appreciated,** he assumed the risk of such an injury and is not entitled to recover even if the defendant was negligent in failing to guard the crank-shaft and screws in any other manner than it was and is here made to appear by the evidence.

"A corporation necessarily acts by and through its agents and servants, and, as stated, the plaintiff was and for many years had been the defendant's agent at Dassel, and, so far as appears, in full charge of all the machinery in question and had full knowledge of its condition, and that he gave the same his personal attention, on the average once daily for about nine years, and during all that time the engine—the crank-shaft and the set screws—remained in the same condition with respect to guards that it was in at the time of the accident, and he never at any time or in any way notified or informed the defendant or any of its officers or employees that its condition was in any way dangerous. If, then, you find that under the circumstances here made to appear the plaintiff understood and appreciated the risks incident to the operation of the engine in that condition and made no complaint to the defendant that the crank-shaft and set screws were imperfectly guarded, and if you further find that such imperfect guarding of the crank-shaft and bolt resulted in the injury complained of, still he cannot recover and your verdict must be for the defendant." (41–42)

No exception was taken to the charge and no requests to charge were made by the defendant and no complaint made of the charge of the Court except the contention that the question of assumption of risk should not have been submitted to the jury and

that the Court should have held, as **a matter of law,** that the employee, Knapp, assumed the risk of injury and was guilty of contributory negligence.

As stated by the Court in the case of Choctaw O. & D. Ry. Co. vs. McDade, 191 U. S. 64, 48 L. ed. 96, 24 S. C. 24; "the charge of the Court upon the assumption of risk was more favorable to Plaintiff in Error than the law requires."

ARGUMENTS, POINTS AND AUTHORITIES.

In the brief of Defendant in Error on the Motion to Dismiss, Affirm or Transfer for Hearing to the Summary Docket, our position is stated as to the scope of review by this Court and also as to the general proposition of assumption of risk.

BUT ONE QUESTION FOR COURT.

Under the facts in this case there is but one question which is seriously urged by the Plaintiff in Error, and that question is that the Defendant in Error assumed the risk of his being injured as he was.

This question has been discussed to some extent in our brief on the Motion to Dismiss, but, owing to Counsel's insistance that the assumption of risk constitutes an absolute bar to any right of recovery in this case, we wish to review the facts and some of the decisions of this Court bearing on the proposition of assumption of risk and also on the question of contributory negligence.

CONTENTIONS OF DEFENDANT IN ERROR.

There are two contentions of Defendant in Error which we wish to especially emphasize:

CONTENTION NUMBER ONE.

That the act of the Defendant in Error was not "Assumption of Risk" but his negligence, if any, comes under the head of "Contributory Negligence."

CONTENTION NUMBER TWO.

That whether his act be "Assumption of Risk" or "Contributory Negligence" it was for the jury to determine whether it would bar a recovery and not for the Court; and where the Trial Court upheld the verdict of the jury and the Supreme Court of Minnesota unanimously affirmed the Trial Court there should be an affirmance by the United States Supreme Court.

It is to be borne in mind in this case that Knapp was not an expert machinist; he had nothing to do with the repairing of the machinery (29) and he had the right to assume that the machinery was in a good and proper state of repair.

Whenever repairing was to be done this was done by one Paul Bogen, and the duty of Defendant in Error was **"simply running the engine"** (29): and the jury could well asume that he had the right to rely and did rely upon the defendant to see that the engine was in a proper state of repair at all times and that it was not dangerous for him to be working thereabouts.

DEFINITION OF ASSUMPTION OF RISK

Perhaps as good a definition of assumption of risk as can be found in the books, is the following:

" 'Assumption of Risk' is a **waiver of defects and dangers by an employee,** and a **consent under an express or implied contract to assume them,** whether he is careful or negligent in his conduct; the doctrine being based on the maxim 'volenti non fit injuria'."

Miller vs. White Bronze Monument Co., 141 Iowa, 901 118 N. W. 518, 523, 18 Ann. Cas. 957.
See also many definitions, pages 324-327, Vol. 1, Words and Phrases, Second Series.

The general definition as given by most of the Courts is that **Assumption of Risk rests on contract,** either express or implied.

However, some of the Courts hold that assumption of risk is based, not upon the contract, but on the principle expressed by the maxim "volenti non fit injuria."

See Rase vs. Minneapolis, St. P. & S. S. M. R. Co., 107 Minn. 260, 120 N. W. 360, 21 L. N. S. 138.

The maxim "volenti non fit injuria" means that he who consents cannot receive an injury.

Rigsby vs. Oil Well Supply Co., 91 S. W. 460, 463, 115 Mo. App. 297.
See Vol. 4, Words and Phrases, Page 1200, Second Series.

Whether assumption of risk is based on the con-

tract, voluntary or implied, as most of the Courts seem to hold, or whether it is based on the maxim "volenti non fit injuria" the deducible rule, from all the decisions, seems to be that **assumption of risk is the voluntary contract or consent of a servant to take the chances of the known or obvious dangers of his employment and to relieve his master from liability therefore.** And the meaning of the doctrine is that the employee "has **waived** his right to hold his employer responsible for the risk."

> Wood vs. Victor Manugfacturing Co., 45 S. E. 81-82, 66 S. C. 482, Vol. 1, Words and Phrases, Page 328, Second Series.

And, in assumption of risk there is an **election deliberately to assume the risk of injury or danger likely to result, in the ordinary course of employment.**

> See Yazoo & Miss. Val. Ry Co. vs. Wright, 35 S. C. 130, 59 L. ed. 277, 235 U. S. 376.

ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE DISTINGUISHED.

The distinction between assumption of risk and contributory negligence has been pointed out in a large number of cases and the two defenses are entirely separate and distinct.

Though in some cases some difficulty may arise in distinguishing them, **the general rule, based on all of the authorities, is that Assumption of Risk is based on the contract of employment, or on the maxim "volenti non fit injuria—"he** who consents cannot receive an injury," while **Contributory Negligence is based on tort.**

Assumption of risk "is mere passive subjection by the servant to risk or injury, in known defective conditions."

Rase vs. Minneapolis S. P. & S. S. M. R. Co., 107 Minn. 260, 120 N. W. 360, 21 L. N. S. 138.

Contributory negligence "**is an act or omission on the servant's own part tending to add new danger to the situation, not necessarily incident to conditions, and bring upon himself a harm caused not solely by them,** but **created in part, at least, by his own** misconduct. **Contributory negligence is a breach of legal duty** to take due care, imposed by law upon the servant, however unwilling or protesting he may be."

Rase vs. Minneapolis, etc. Company, supra.

"Assumption of Risk is not a duty, but is purely voluntary upon the part of the servant. The doctrine of Assumption of Risk rests on intelligent acquiescence with knowledge of danger and appreciation of the risk."

Rase vs. Minneapolis, etc., Company, supra.

ASSUMPTION OF RISK—WAIVER OF RIGHT.

"Assumption of risk rests in the law of contract, and involves an implied agreement by the employee to assume the risk ordinarily incident to his employment, or a waiver, **after full knowledge of an extraordinary risk,** of his right to hold the employer for breach of duty in this regard. Hooper vs. Columbia & G. R. Co., 21 S. C. 547, 53 Am. Rep. 691. **The law as to waiver applies because the relation between the employer and employee is contractual,**

and waiver is the voluntary relinquishment of a known right. By the contract, the employee and employer each assume certain risks; but as in all contracts, either party may waive his right to insist upon strict performance of the other's contractual duty. * * * * Contributory negligence, on the other hand, rests in the law of tort as applied to negligence."

Wood vs. Victor Man. Co., 45 S. E. 81, 66 S. C. 482; Bodie vs. Charlestown & W. C. Ry Co. 39 S. E. 715, 61 S. C. 478; Words and Phrases, Volume 1, Pages 328-329, Second Series.

The Federal Supreme Court is in line with the majority of the decisions in the state courts on the proposition that assumption of risk is based on the contract.

Mr. Justice Pitney, in the case of Seaboard Air Line Co., vs. Horton, 233 U. S. 492, 58 L. ed. 1062-1070, 34 Sup. Ct. 635, distinguishes between contributory negligence and assumption of risk as follows:

"The distinction, although simple, is sometimes overlooked. **Contributory negligence involves the notion of some fault or breach of duty** on the part of the employee; and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, **the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee.** The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman,—

danger that must be and is confronted in the line of his duty. **Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages."**

PRELIMINARY CONDUCT—ASSUMPTION OF RISK.

"The **preliminary conduct** of **getting into the dangerous** employment or relation is said to be accompanied by assumption of the risk. **The act more immediately leading to a specific accident** is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master (a matter upon which we express no opinion) then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."

Schlemmer vs. Buffalo R. & P. R. Co., 205 U. S. 1, 51 L. ed. 681, 27 S. C. 407.

In the memorandum opinion of the Court, Mr. Chief Justice White in the case of Yazoo & M. V. Ry Co., vs. Wright, 235 U. S. 375, 59 L. ed., 277, 35 S. C. 130, again points out the distinction between the two defenses.

In that case an engineer was killed by reason of coming into contact or colliding with certain coal-cars which were left on a yard track connecting with and to the left of the lead track on which his engine was proceeding.

It was contended by the railroad company that the engineer assumed the risk of injury because of the fact that "**as in a railroad yard there was danger to arise from the protrusion of cars negligently placed by employees of the company, a danger which the engineer must have known might arise, therefore he assumed the risk of such danger. And again the argument is that even although the engineer did not know of the protruding cars, and therefor did not consciously incur the great risk to result from the collision yet, as by proper precaution he could have discovered** the fact that the cars were protruding, he must be considered to have assumed the risk which resulted from his want of care."

The Court says that the facts preclude all inference that the engineer "**deliberately elected to assume the risk of collision and great danger which would be the inevitable result of his continuing the forward movement of his train.**"

And the Court further says that the argument claimed to bring the employee within the rule of the assumption of risk doctrine "**has no relation to the doctrine of assumption of risk, and only called for the application of the principle of contributory negligence.**"

As we stated in our brief in support of the Motion to Dismiss:

"Applying the above rule to the case at Bar, the facts stated **absolutely preclude all inference that Knapp deliberately elected to assume the risk of his hand coming in contact with the unguarded crank-shaft.** He was not working about this unguarded crank-shaft at the time he was injured but was passing by another part of the machinery,

and **was involuntarily thrown,** owing to some mishap, onto the fly-wheel and then, in the effort to save himself, threw himself forward onto the unguarded crank-shaft.

"There certainly is no room for the contention that he **deliberately elected to assume the risk of collision and great danger, which would be the inevitable result of his continuing in the employment" of the railroad company.**

The Minnesota Supreme Court held that the acts of the Plaintiff, Knapp, were acts of **contributory negligence rather than assumption of risk,** the Court saying that Knapp **"either slipped on the greasy floor, or inadvertently and negligently came too near the shaft and fly-wheel. It does not much matter which, because the jury could well say neither came within the risks understood and appreciated by the plaintiff, that it was an involuntary and unforeseen mishap. Both causes given for losing his balance may be referable to Plaintiff's negligence rather than to an assumption of known and appreciated danger arising out of Defendant's negligence."**

Knapp vs. Great Northern Ry Co., 130 Minn. 405, 153 N. W. 848, Record Page 55.

There seems to us to be no doubt but that the question of assumption of risk is not and cannot be properly raised on the facts in this case.

The general holdings of the Courts of all the states and the holding of the Supreme Court of the United States, as shown by the decision in Seaboard Air Line Company vs. Horton, supra, 233 U. S. 492, 58 L. ed. 1062, 34 S. C. 635, is that the facts in this case constitute **contributory negligence** rather than **assumption of risk.**

Furthermore the Supreme Court of Minnesota, on these very facts, has decided that they did not constitute assumption of risk but rather contributory negligence and that in either event the questions were for the jury.

It is clear that there is, strictly speaking, no question whatever of assumption of risk in this case.

CONTENTION NUMBER TWO.

That whether his act be "assumption of risk" or "contributory negligence" it was for the jury to determine whether it would bar a recovery and not for the court. And where the Trial Court upheld the verdict of the jury, and the Supreme Court of Minnesota unanimously affirmed the Trial Court, there should be an affirmance by the United States Supreme Court.

On the theory that the Court might conclude the facts sufficient so that the question of assumption of risk may be properly raised, we come now to consider the rule applicable to assumption of risk, when the facts justify the application of such rule.

Generally speaking, assumption of risk is a question of fact. Whether certain acts constitute an assumption of risk is always a question for the jury to determine, unless the facts are such that on the most favorable theory the employee must be precluded from a recovery.

We shall content ourselves with stating what we believe to be the general rule on the question of assumption of risk, with the authorities which we think bear out the proposition that assumption of risk is always a question for the jury, save in the ex-

ceptional cases where reasonable men could come to but one conclusion from the facts proven.

As we view it, the questions are:

What is the general rule?

Was that rule properly applied?

It is asserted in the brief of the Defendant in Error:

"We confidently assert that in the books there cannot be found a single case sustaining the proposition that **if the accident was occasioned from exposed set-screws or from walking too close to the same** Defendant in Error did not assume such risks."

In the first place there is such a decision "in the books" and it is approved by this Court. We refer to the case of Washington & Georgetown Ry Co., vs. McDade, 135 U. S. 554, 34 L. ed. 235, 10 S. C. 1044, wherein the case of Daley vs. American Printing Co., 150 Mass. 57 is cited and quoted with approval.

The Daley case involved a question of injury from "exposed set-screws" and we will hereafter particularly refer to the same.

However, in our view of the matter, it is not proper to say that **an employee assumes the risk "from exposed set-screws"** or **does not assume the risk "from an unguarded crank-shaft,"** but the question is: **What is the general rule on assumption of risk and was it properly applied?**

An employee may assume the risk "from exposed set-screws" in one case and **may not assume the risk "from exposed set-screws"** in another.

A great variety of things may have occurred previous to the injury which would make room for the doctrine of assumption of risk "from exposed set-screws" in one place and leave no room for the doctrine where the injury was from the same sort of "set-screws" under different circumstances.

From all the facts the jury should decide whether there was an assumption of the risk under proper instructions from the Trial Court.

In the present case, if the evidence had shown that Knapp had known of persons being injured by coming in contact with these set-screws there might be some room for the contention of Plaintiff in Error that he appreciated the dangers of working in the vicinity of said set-screws.

If Knapp had been warned of the danger of the set-screws there might again be room for the contention of Plaintiff in Error that he appreciated the risk.

In the present case no one had previously been injured in this pump-house.

In the present case Knapp had never been warned of any danger.

In the present case nothing had occurred which would cause an ordinarily prudent man to appreciate any risk or danger from these set-screws or the unguarded crank-shaft.

There is nothing in this case to show that Knapp could have taken any precautions to guard himself against danger other than he did.

"If the plaintiff had taken such precaution as

his **own observation and experience** had taught him to be necessary," he could not be held to be guilty of either contributory negligence or assumption of risk.

> Baltimore & Potomac Ry Co., vs. Cumberland, 176 U. S. 230-232, 44 L. ed. 447, 20 S. C. 380.

In the instant case what precaution should Knapp have taken?

What did his observation and experience teach him to be necessary?

The evidence is absolutely silent as to any question of his **knowledge or appreciation of any danger** of being injured, in the manner in which he was injured.

The evidence is also silent as to **what precaution he should have taken** and the Record does not show that he was guilty of such **recklessness in remaining in the employment of the railroad company,** with the machinery in its then condition, as to preclude him from recovering.

KNOWLEDGE OF CONDITION.

In the case of Texas & Pac. Ry Co. vs. Swearingen, 196 U. S. 51, 49 L. ed. 382, 25 S. C. 164, a railway scale box was built so near the track as to be hazardous to switchmen. The injured switchman **knew where the scale box was located but he did not know that it was so near that it could not be passed in the performance of his duties as a switchman without danger."**

And the same rule might be said to apply relative to the set-screws on a fly-wheel near which an em-

ployee would be obliged to pass in the performance of his duty.

There was no testimony in the case at bar relative to knowledge of danger on the part of Knapp and "he did not know that the fly-wheel" and exposed set-screws" could not be passed in the performance of his duties "without danger."

"It was, therefor, properly a question for the determination of the jury whether or not the scales were maintained in a reasonably safe place, and if not, whether the plaintiff had notice thereof. The Court of Appeals was of opinion, and rightly we think, that the dangerous contiguity of the scale box to track No. 2, and the extra hazard to switchmen resulting therefrom, was not so open and obvious on other than a close inspection, as to justify taking from the jury the determination of the question whether there had been an assumption of the risk, The plaintiff was entitled to assume that the defendant company had used due care to provide a reasonably safe place for the doing by him of the work for which he had been employed, and as the fact that the defendant company might not have performed such duty in respect to the scale box in question was not so patent as to be readily observable, the Court could not declare, in view of the testimony of the plaintiff as to his actual want of knowledge of the danger, that he has assumed the hazard incident to the actual situation."

Texas & Pac. Ry. Co. vs. Swearingen, supra.

We submit to this Court that under the facts in the foregoing case the decision above quoted is appropriate and applicable.

In the instant case, as in the case just quoted, the conditions were such that it would not "justify taking from the jury the determination of the question whether there had been an assumption of risk"; a question this Court should not determine, as a matter of law, in view of the fact that there is no evidence that Plaintiff knew of any such danger nor "that he has assumed the hazard incident to the actual situation."

FUNCTION OF COURT AND JURY.

As to the respective functions of the Court and jury in such cases we quote the statement of Mr.Justice Hunt in the case of Sioux City and Pac. Ry Co. vs. Stout, 17 Wall. 657, 21 L. ed. 745, 84 U. S. 657. Although in this case the question was whether the **contributory negligence** of the injured boy would preclude a recovery the rule as to the respective functions of the Court and jury is the same whether it be relative to the submission of the **question of contributory negligence, assumption of risk, or any other question of fact,** to the jury.

"Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed: Another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of the jury. Twelve men of the average of the community comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their

separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain, It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge.

In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, and although the facts are undisputed, it is for the jury and not the judge to determine whether proper care was given or whether they establish negligence."

QUESTIONS OF FACT FOR JURY.

The following statement of the Court has been often quoted by the Supreme Court of the United States and by the Supreme Court of the State of Minnesota in this very appeal:

"But we think these questions are for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact why it should not decide such questions as these as well as others. * * *

"Instead of the course here pursued a due regard for the respective functions of the Court and the jury would seem to demand that these questions should have been submitted to the jury accompanied by such instructions from

the presiding Judge as would have secured a sound verdict."

Jones vs. E. Tennessee V. & G. Co., 128 U. S. 443; 32 L. ed. 478-480; 9 S. C. 118.

The Trial Court in the case at Bar refused to direct a verdict, and on motion made for Judgment Non Obstante Veredicto or a new trial adhered to his original decision and refused to grand judgment or a new trial.

The Supreme Court of Minnesota affirmed the Trial Court and was of opinion that there was no proper question of assumption of risk in the case but that whether the question was assumption of risk or contributory negligence **the question was one for the jury to determine and not one to be determined by the Court as a matter of law** and the case of Jones vs. East Tennessee, etc., supra, was quoted with approval by the Minnesota Court in its opinion.

"If upon any view which could be properly taken of the facts the evidence tended to establish" the jury would have been justified in returning a verdict for the injured party, the question of contributory negligence will not defeat a recovery and is for the jury rather than for the Court.

Dunlap vs. North Western Ry. Co., 130 U .S. 649, 32 L. ed. 1058, 9 S. C. 647.
To the same effect see Louisville & N. Ry Co. vs. Woodson, 134 U. S. 614, 33 L. ed. 1032, 10 S. C. 628.

The general rule is again stated by this Court that:

"Where the facts are in dispute and the evidence in relation to them is that from which **fair-minded**

men may draw different inferences the question is one for the jury."

> Washington & Georgetown Ry. Co. vs. McDade, 135 U. S. 554, 34 L. ed. 235, 10 S. C. 1044.

In the above case, after the statement of facts by Mr. Justice Lamar, it is held that the question of the negligence of McDade was for the jury and it is said that the employee "must be deemed to have assumed the risk of **all danger reasonably to be apprehended from such use."**

In the McDade case the employee was attempting to put a belt onto certain machinery, and over a certain wheel attached to a shaft while the wheel and shaft were in motion.

So far as the question of "set-screws" is concerned "the evidence offered by the plaintiff certainly tended to show that the injury would not have occurred but for the defect of the fixed pulley **and the projecting screw."**

McDade was working about the pulley in question and about and in the vicinity of the defective or projecting set-screw at the time he was injured.

Considering all of the facts in that case it was held by the Court that it was a question for the jury whether or not he was guilty of such negligence as would preclude a recovery and the Court cited with approval the cases of Sioux City etc. Co. vs. Stout and Jones vs. East Tennessee etc. Co., supra, relative to the functions of the Court and jury in such actions.

The case of Daley vs. American Printing Co., 150 Mass. 77, is quoted with approval in the McDade case, supra, and in view of the confident assertion of counsel

for Plaintiff in Error **"that in the books there cannot be found a single case sustaining the proposition that if the accident was occasioned from exposed set-screws" there could be a recovery,** we deisre to quote from the McDade case the statements approving Daley vs. American Printing Company, as follows:

"Daley vs. American Printing Co., 150 Mass. 77, was an action by an employee for personal injuries sustained while in the performance of his duties in the defendant's mill, using an elevator operated by a belt passing over a pulley on a shaft. At the trial the evidence introduced by the plaintiff tended to show that the belt was frequently off the pulley; and there was no one in the employ of the defendant specially charged with putting it on when it came off; and that anyone using the elevator put the belt on when he found it off. It further showed that the plaintiff having occasion, in the course of his regular duties, to use the elevator, found the belt off and proceeded to put it on, **but in so doing was caught in a set screw projecting from a collar on the shaft and whirled around the shaft,** and received serious injuries. The Defendant introduced testimony to show that there was another man whose duty it was to put on the belt. At the conclusion of the testimony the trial court directed a verdict in favor of the defendant, and, the case being carried up on exceptions to the Supreme Judicial Court, that Court reversed the judgment of the Court below and ordered a new trial. In its opinion the Court said: 'The ground upon which the case was withdrawn from the jury is not stated. We cannot say, as matter of law, that no sufficient evidence was introduced or offered of negligence on the part of defendant, or of freedom from negligence on the part of the plaintiff.' . . .**If the machinery was found to be unsuitable, and if the plaintiff was within the line of his duty in**

attempting to adjust the belt, we cannot say that he was not entitled to go to the jury on the question of whether he was in the exercise of due care."

The Court, in the McDade case, supra, also quotes with approval the statement from Myers vs. Hudson Iron Company, 150 Mass. 125:

"The risk of the safety of machinery is not assumed by an employee, unless he **knows** the danger, or unless it is so obvious that he will be presumed to know it."

FAVORABLE VIEW OF EVIDENCE.

The following statement is much in point:

"The case should not have been withdrawn from the jury unless the conclusion followed, as a matter of law, that **no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish."**

Texas & Pac. Ry.Co. vs. Cox, 145 U. S. 593, 36 L.ed. 829, 12 S. C. 905.

"Questions of negligence do not become questions of law, to be decided by the Court, except **"where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish.** Gardner vs. Michigan R. Ry. Co. 150 U.S. 349, 361, 37 L. ed. 1107, 1110, 14 Sup. Ct. Rep. 140."

Kreigh vs. Westinghouse, C. K. & Co. 214 U. S. 258, 53 L. ed. 989, 29 S. C. 608.

"It is well settled that where there is **uncertainty** as to the existence of either negligence, or contributory negligence, the question is not one of law, but of fact, to be settled by a jury; and this, **whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fairminded men will honestly draw different conclusions from them.**"

Richmond & Danville Ry Co. vs. Powers, 149 U. S. 43, 37 L. ed. 642, 13 S. C. 748.

The same rule would apply as to assumption of risk as applies in the case of negligence or contributory negligence.

HUMAN LIFE—QUESTION FOR JURY.

"Where human life or personal safety is involved, and the issue is one of negligence, the law will not lightly impute negligence to an effort, made in good faith, to preserve the one or secure the other, unless the circumstances, under which that effort was made, show recklessness or rashness."

Union Pacific Ry Co. vs. McDonald, 152 U. S. 260-262, 38 L. ed. 434, 14 S. C. 619.

WEIGHT TO BE GIVEN CONCURRENT OPINIONS OF TRIAL AND SUPREME COURT.

Bearing in mind that the Trial Court and the Supreme Court held the evidence sufficient to go to the jury in this case, the following statement is especially applicable:

"It is undoubtedly true that **cases are not to be lightly taken from the jury**; that **jurors are the recognized triers of questions of fact; and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them.**"

Richmond & D. R. Co., vs. Powers, 149 U. S. 43, 37 L. ed. 642, 13 S. C. 748.

"Hence it is that **seldom an appellate court reverses the action of a Trial Court in declining to give a peremptory instruction for a verdict one way or the other.** At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who, in our jurisprudence, stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an Appellate Court will pay large respect to his judgment, and if such judgment is approved by the proper appellate Court, this

Court, when called upon to review the proceedings of both Courts, **will rightfully be much influenced by their concurrent opinions."**

> Patton vs. Texas & Pac. Ry Co., 179 U. S. 658, 45 L. ed. 361, 21 S. C. 275.

In the Patton case the Trial Court **directed a verdict in favor of the defendant and this** action was approved by the Appellate Court and later by the Supreme Court.

In the case of Supreme Lodge K. of P. vs. Beck, 181 U. S. 48-50, 45 L. ed. 741, 21 Sup. Ct. 532, the Trial Court **refused to direct a verdict in favor of the defendant** and its action was affirmed by the Appellate Court. When the case came before the Supreme Court of the United States, Mr. Justice Brewer, speaking for the Court, said:

"We have recently had before us a case, coming like this from the Trial Court to the Court of Appeals, (Patton vs. Texas & P. Ry Co., 179 U. S. 658, ante 361, 21 S. C. 275) in which the action of the Trial Court in **directing a verdict** was vigorously attacked as an invasion of the province of the jury to determine every question of fact. **That case stands over against this, for there the Trial Court directed a verdict. Here it refused to direct one. In each case its action was approved by the Court of Appeals. In that case, although the question was doubtful, we sustained the rulings of the Lower Court;** and the **considerations which then controlled us** compel a like action in the present case."

It is to be noted that the Court in the Beck case seemed to be of the opinion that in the Patton case "the question was doubtful"—being the question of the right of the Court to direct a verdict for the

defendant—but its action was sustained **because of the fact that it was concurred in by the Lower Appellate Court.**

OPINION OF LOWER COURT—WEIGHT OF.

In the case of Marande vs. Texas & Pac. Ry Co. 184 U. S. 173, 46 L. ed. 487, 22 S. C. 340, the Trial Court directed a verdict in favor of the Defendant and this action was approved by the Circuit Court of Appeals. Mr. Justice White, now Chief Justice, in that case said:

"As both courts below have held that the evidence had not the tendency stated their decision is entitled to great respect—a respect however, which cannot relieve us from securing the plaintiffs in the enjoyment of their **constitutional right to trial by jury,** if, in our opinion, the case made by them was one proper to be decided as one of fact by the jury, and not to be concluded as matter of law by the Court."

Marande vs. Texas & Pac. Ry Co., 184 U. S. 173, 46 L. ed. 487, 22 S. C. 340.

The above case further holds that in order to over-ride the verdict of a jury, and in order to justify the Court in directing a verdict **it must appear that it would have been unreasonable for the jury to deduce the conclusion they did and that the reasonable tendency of the proof gave them no right to come to the decision arrived at.**

And in the Marande case this Court, on the ground that the plaintiff had been denied his constitutional right of the determination of the facts by a jury, reversed the Circuit Court of Appeals and granted a new trial.

In order that there be a reversal in this case the Supreme Court must hold that both the Trial Court and the Supreme Court of Minnesota **"reached a wrong result"** in holding the evidence sufficient for the jury.

Reese vs. Phila. & Reading Ry Co., 36 S. C. 134-135. See also Leach vs. Burr, 188 U. S. 510, 47 L. ed. 567, 23 S. C. 393.

RISK OF EMPLOYMENT ASSUMED—NOT RISK OF MASTER'S NEGLIGENCE.

The general rule cannot be controverted that the employee assumes the **ordinary and usual risk of the employment, but** not the **risk of the negligence** of his employer.

See Schlemmer vs. Buffalo R. & P. Co., 205 U. S. 1, 51 L. ed. 681, 27 S. C. 407.

NEGLIGENCE—SCOPE OF INQUIRY—QUESTION FOR JURY.

In the present appeal there is **nothing which appears as negligence per se** and it is undoubtedly a question of fact, whether the employee assumed the risk, even though the evidence is undisputed. It was for the jury to make a proper deduction from the testimony.

"It is well, before noticing the testimony, to consider the extent to which our inquiry may properly go. **The settled rule is that where negligence is a mere question of fact, and nothing appears**

which is negligence per se, the determination of the question is peculiarly the province of the jury and its conclusions will not be disturbed unless it is entirely clear that they were erroneous. Courts do not approach the question as an original one, and consider whether, in their judgment, the testimony does or does not prove negligence, but accept the determination of the jury, if there is any evidence upon which it can be rested. This is the general rule in respect to all mere questions of fact."

Davidson Steamship Co., vs. United States, 205 U. S. 187, 51 L. ed. 764, 27 S. C. 480.

The above case also refers with approval to the case of Sioux City etc. vs. Stout, 17 Wall. 657, 21 L. ed. 745, 84 U. S. 657, and, in closing the opinion, the Court says:

"At any rate, the verdict of the jury was against the contention of contributory negligence on the part of the government, and the jury was the tribunal to determine this, as well as the question of negligence. We could not set aside the verdict of the jury, **approved** as it was by the Trial Court and the **Court of Appeals, without ourselves exercising the function of triers of facts, when, under the law, such questions are committed to the determination of a jury."**

Davidson Steamship Co. vs. United States, supra.

And in the case at Bar the above law is peculiarly applicable and this Court can well say "at any rate the verdict of the jury was against the contention of 'assumption of risk' on the part of the 'railroad company' and the jury was the tribunal to determine this, as well as the question of negligence. We could not set aside the verdict of the jury, approved as it

was by the Trial Court and the 'Supreme Court of Minnesota' without ourselves exercising the functions of triers of facts, when, under the law such questions are committed to the determination of the jury."

VOLUNTARY EXPOSURE TO DANGER.

While the Court in the case of Butler vs. Frazee, 211 U. S. 459, 53 L. ed. 281, 29 S. C. 136, held that the assumption of risk appeared as a matter of law, this case was a case wherein the **Trial Court** directed a verdict in favor of the defendant and its action was **approved by the Court of Appeals of the District of Columbia.** The Supreme Court of the United States then **affirmed** the lower courts in the direction of such verdict. But, in that case it is said:

"Where the elements and combination out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employee must be held, as matter of law, to **understand, appreciate** and **assume the risk** of it. * * * But where the conditions are constant and of long standing, and the danger is one that is **suggested by the common knowledge** which all possess, and both the **conditions and the dangers are obvious to the common understanding,** and the employee is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction, from the plaintiff's own evidence, the question becomes one of law for the decision of the Court."

Butler vs. Frazee, supra.

In the Knapp case the danger of being injured as he was, was not **"suggested by the common knowledge which all possess"** and there were no

"dangers obvious to the common understanding" and, "all these elements of the problem" did not "appear without contradiction from the plaintiff's own evidence."

There was **no evidence** on the part of the plaintiff or anyone else **to show that common knowledge would suggest the danger he was liable to.** In fact, from the evidence it is conclusive that the **idea of injury in this manner never could occur to the plaintiff and could not have been anticipated by him at any time from the day he commenced working for the railroad company to the date of his injury.**

He was not working about the particular piece of machinery that injured him and he could not anticipate that he would be likely to fall, and, in an effort to save himself, throw his hand onto the unguarded crank-shaft.

AWARE OF RISK.

It is fundamental that an employee does not assume a risk that he is not aware of.

This being so, can we find from the evidence anything to show that Knapp was **aware of the risk of injury** in the manner in which he was injured?

CRANK-SHAFT UNGUARDED.

While we have discussed the question of the failure of the Plaintiff in Error to guard the set screws, it should not be forgotten that the negligence of the Plaintiff in Error in failing to guard the crank-shaft was a contributing cause of the injury to its employee.

The set screws did not in fact inflict any injury—Knapp had released himself therefrom; and, aside from the tearing of his coat and throwing him forward, no damage was done by reason of his coming in contact with the set screws.

It was the unguarded crank-shaft which took off his arm.

It was the negligence of the Plaintiff in Error in failing to provide a suitable guard over its crank-shaft that caused "or contributed to" his injury.

Had the crank-shaft been guarded, no injury would have occurred to Knapp.

The sole result of his clothing being caught on the set screws would have been the tearing of his coat. **He was not thrown onto the fly-wheel and had succeeded in extricating himself from that peril,** but, because of the failure to guard the crank-shaft, his arm, when he threw it out to protect himself, went onto the unguarded crank-shaft and was torn off.

In order to find that Knapp was guilty of assumption of risk, as a matter of law, the Court must say that **he understood and appreciated the danger of coming in contact with this unguarded crank-shaft and that it so conclusively appears that he did so understand and appreciate this danger that the court should decide the question as a matter of law** instead of leaving this question of fact to the jury.

ASSUMPTION OF RISK A VOLUNTARY ACT.

The injury to Knapp was due to an involuntary

act on his part.

An employee cannot assume the risk of something he had no thought of at the time of entering the employment or at any time prior to the date of the injury.

It cannot be said from the Record, that, within the wording in the case of Yazoo & Miss. Ry. Co. vs. Wright, 35 S. C. 130, 59 L. ed. 277, 235 U. S. 375, that Knapp **"deliberately elected to assume the danger" which would be the inevitable result of his "continuing in the employment of the company."**

What risks did Knapp assume?

He only assumed **the ordinary risk of his employment.**

The fact that he may have negligently come in contact with the set screws and thereafter, in an effort to prevent injury to himself, threw his arm onto the unguarded crank-shaft, was not a **risk that he assumed** and his act in so doing, if negligent, was **an act of contributory negligence.**

Did Knapp **contract to relieve his master from its carelessness: and thus assume the risks of his employment?**

If he did he contracted to **assume the risk ordinarily incident to his employment and not such risks as he could not foresee**—not the risk of the master's negligence.

There is nothing in the Record to show that Knapp **knew that the want of a guard over the crank-shaft or the set screws were defects and that it was dangerous for him to remain in the employ**

of the company until such defects were remedied.

The doctrine of assumption of risk implies that there is a **voluntary exposure to danger.**

There was no such voluntary exposure in this case, hence there can be no assumption of risk, nor, as said by the Court in the case of Seaboard Air Line Company vs. Horton, 233 U. S. 492, 58 L. ed. 1063, 34 S. C. 635, was the liability of injury to Knapp, in the manner the injury happened "taken into account in fixing the rate of wages."

His injury was not one that must be and is confronted in the line of his duty. He could not assume the risk of such an injury as he could not possibly know he was likely to be injured in any such manner.

Further, on the question of assumption of risk, the **burden of proof is on the railroad company and the evidence,** in order to justify a reversal by this Court, must show **conclusively** that he did **understand and appreciate the danger of being injured in the manner in which he was injured.**

Can it be said that Knapp, when he entered the employment, **waived the right to hold the master responsible for the injury incurred when he could not know the liability of such injury?**

The answer obviously must be "No." **Knapp himself did not know that such a risk as that to which the master's negligence exposed him, existed and he could not waive or assume a risk that he knew nothing of.**

SUPREME COURT OF MINNESOTA

APPLIED COMMON LAW RULE.

The contention is made by the Plaintiff in Error in its brief, Pages 19-22, that the defense of assumption of risk was applied by the Supreme Court of the State of Minnesota to the facts of this case, as that Court **"had modified this defense when applied to cases arising under the Safety Appliance Act of that State."**

In the first place, regardless of the theory of the Supreme Court in deciding this case their **decision is correct under the common law of the State of Minnesota and of the United States,** as interpreted by the Federal Decisions heretofore quoted.

Secondly, the Supreme Court of the State of Minnesota applied to the facts in the case the Common Law rule of assumption of risk, as laid down by the decisions of the United States Supreme Court, **and this Common Law rule of assumption of risk has not been "modified" or in any way changed by the Safety Appliance Act of The State of Minnesota,** relative to guarding dangerous machinery.

In the case of Anderson vs. C. N. Nelson Lumber Company, 67 Minn. 79, 69 N. W. 630, the Supreme Court of Minnesota says:

"Some stress is laid upon the fact, as is claimed, that by Laws 1893, c. 7, Par. 1, (G. S. 1894, Par. 2248) (the same being the statute requiring employers to guard dangerous machinery) the duty of guarding these saws was made a statutory one. **The fact that a duty is imposed by statute does not change the rules of law as to contributoty negligence**

or to assumption of risk, unless there is some provision in the statute clearly expressing or implying an intention to do so. Knisley vs. Pratt, 148 N. Y. 372, 42 N. E. 986; O'Maley vs. Gas Light Co., 158 Mass. 135, 32 N. E. 1119."

It is also said in the case of Glockner vs. Hard Wood Manufacturing Company, 109 Minn. 30, 122 N. W. 465, 123 N. W. 807, that the statute **"does not change the common law as to the defense of contributory negligence or assumption of risk."**

See also Schutt vs. Adair, 99 Minn. 7, 108 N. W. 811.

The statements made by Mr. Justice Philip E. Brown, in the case of Falconer vs. Sherwood, 118 Minn. 357, 136 N. W. 1039, is simply the **private opinion** of the writer of that decision, and, as he says, **"speaking for himself alone,"** and it is not the opinion of the Court.

And it is not the law of the State of Minnesota that the **defense of assumption of risk has been modified by the Safety Appliance Act of that State.**

Counsel for Plaintiff in Error, in the discussion of the three cases determined by the Minnesota Supreme Court which involve a violation of the State Safety Appliance Act, have fallen into the error of assuming that under these decisions the Minnesota Court has adopted one rule for determining assumprion of risk where a statute is violated and another rule where the same is not violated and where negligence is under the Common Law.

There is nothing in these decisions to warrant such a decision on the part of counsel for Plaintiff in Error.

The violation of a statutory duty goes only to the question of negligence and the Minnesota Court in each of these cases has applied the Common Law doctrine of assumption of risk.

The only change made in the law is that the violation of the statute is prima facie proof of negligence. That is, the mere fact of the violation of the statute is proof of negligence without showing that reasonable care required the machinery in question to be guarded.

It is a question of **proof,** not a question of the **remedy** and so far as the defenses of assumption of risk and contributory negligence are concerned, they remain identically the same as they were before the statute was enacted.

The same argument has been made relative to the Federal Employer's Liability Law.

Although this law gives greater rights to the employee, it does not do away with the defense of assumption of risk as it existed at Common Law, except in case of the violation of a statute enacted for the protection of employees.

CONSIDERATION OF POINTS AND AUTHORITIES OF PLAINTIFF IN ERROR.

On pages 12-19 of its brief Plaintiff in Error claims that a recovery should be denied because of knowledge of the condition of the machinery by the Defendant in Error.

While it is shown that Defendant in Error had worked around the machinery for nine years, the Record does not show that he **knew, appreciated** or **understood the danger** to which he was exposed or the likelihood of being injured in the manner in which he was injured.

On page 13 of the Brief, Plaintiff in Error states:

"He **necessarily** knew that if he walked too close to the set screws his clothes might become entangled thereon."

If he did walk too close to the set screws and was caught thereon his action would constitute **a contributing cause of the injury** and would be **contributory negligence** and not assumption of risk.

The question of contributory negligence was submitted to the jury under the Comparative Negligence Doctrine and no complaint was made as to the manner of its submission.

On page 23 of its brief Plaintiff in Error says:

"By his contract of employment he assumed the risk" of the condition of the pump-house.

He did assume the risks **naturally and ordinarily incident to his employment** but not the **risk of the master's negligence** until it was shown that he **fully understood and appreciated the risk to which he was exposed.**

This is an affirmative defense and the burden was on the railroad company to affirmatively show from the evidence that "he did understand and appreciate the risk and danger to which he was exposed.

"By his contract of employment" he could only assume these **ordinary risks.**

He did not assume something he had no knowledge of, else how could he assume it?

If he himself was guilty of some negligence his act would constitute contributory negligence and, as to contributory negligence, the more humane doctrine of comparative negligence was submitted to the jury.

NEGLIGENCE.

The question of the ngeligence of the Plaintiff in Error is discussed in its brief but we do not believe this proposition worthy of serious argument.

The question of negligence is a question of fact and this fact was thoroughly submitted to the jury, no objection to the Court's charge was made by the defendant below and the jury, having found that defendant was negligent, and the Supreme Court of the State of Minnesota having affirmed the Order of the Trial Court, refusing to grant judgment non obstante veredicto, or a new trial, the Federal Supreme Court will not now interfere with that decision, especially as it involves only a question of fact, which it was the province of the jury to determine and not the province of this Court.

DECISIONS CITED BY PLAINTIFF IN ERROR

We do not believe a review of the many decisions of the lower Federal Courts cited by the Plaintiff in Error could be of any assistance to the Court in the determination of this cause. The Supreme Court decisions are plain and from these decisions and from all the facts in the case there must be an affirmance.

The Plaintiff in Error asks this Court—an Appellate Tribunal, to find:

First: That there was no negligence on the part of the railroad company—**a pure question of fact.**

Second: Assuming there was such negligence, that Knapp assumed the risk, **also a question of fact.**

To do this this Court must:

(*a*) **Find that the Trial Court erred in submitting these facts to the jury.**

(*b*) **Over-ride the decision of the jury on two questions of fact submitted to them—negligence and assumption of risk.**

(*c*) **Find that the Supreme Court of Minnesota erred on a question of law in holding the facts did not constitute assumption of risk, but contributory negligence.**

(*d*) **Find that the Supreme Court of Minnesota erred in holding that if the facts properly raised the defense of assumption of risk, that this issue of fact was a question for the jury.**

In other words, in order to absolve itself from liability the Plaintiff in Error asks the Federal Supreme Court to substitute itself for a jury and to usurp the functions of a jury and declare as a matter of law there was no liability in the case. The Supreme Court is asked to decide **questions of fact** which it has always been the province of the jury to decide.

Counsel ask that the **Court should declare what the law requires** of each party in the case

and that the **Court should also determine whether the facts show a compliance therewith.**

This is not the function of the Court.

"The Court should **declare what the law requires** of each party in such case, **leaving the jury to determine whether the facts show a compliance therewith.**"

Schutt vs. Adair, 99 Minn. 7, 108 N. W. 811.

Respectfully submitted,
TOM DAVIS and
ERNEST A. MICHEL,
Attorneys of Record
for Defendant in Error,
Marshall, Minnesota.

JOHN I. DAVIS,
Of Counsel,
Benson, Minnesota.

Dated this 12th day of February, 1916.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 690.

OCTOBER TERM, 1915

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

O. B. KNAPP,
Defendant in Error.

In Error to the Supreme Court of Minnesota.

MOTION TO DISMISS, AFFIRM OR TRANSFER FOR HEARING TO THE SUMMARY DOCKET.

TOM DAVIS and
ERNEST A. MICHEL,
Both of Marshall, Minnesota,
Attorneys of Record for Defendant in Error.

JOHN I. DAVIS,
Of Counsel,
Benson, Minnesota.

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Defendant in Error.

In Error to the Supreme Court of Minnesota.

MOTION TO DISMISS, AFFIRM OR TRANSFER FOR HEARING TO THE SUMMARY DOCKET.

Now comes the above named Defendant in Error and moves this Court:

1st: That the writ of error in this action be dismissed on the ground that no question is presented

authorizing this Court to take jurisdiction of the above entitled action.

2nd: In the alternative, the Defendant in Error moves this Court that the judgment of the Supreme Court of the State of Minnesota be affirmed, on the ground that it is manifest that the writ of error therein was taken for delay only; and that ten per cent damages be awarded to Defendant in Error on the ground that said appeal was taken and said writ of error sued out merely for delay.

3rd: That the judgment of the Supreme Court of Minnesota be affirmed, because the questions upon which the decision of the cause depends are so frivolous as not to need further argument.

4th: In case none of the above motions be granted, then the Defendant in Error will move the Court that the above entitled cause be transferred for hearing to the Summary Docket of said Court, because the case is of such a character as not to justify extended argument.

TOM DAVIS and
ERNEST A. MICHEL,
Both of Marshall, Minnesota,
Attorneys of Record for Defendant in Error.

JOHN I. DAVIS,
Of Counsel,
Benson, Minnesota.

NOTICE OF MOTION.

The Plaintiff in Error is hereby notified that the Defendant in Error will, on the 3rd day of January, A. D., 1916, on the convening of the Supreme Court of the United States on that day, or as soon there-

after as a hearing may be had, submit for the consideration of said Court the foregoing and annexed motions, and each of them and brief in support thereof hereto attached including portions of the record as contained in an appendix thereto, all of which are now served upon you herewith.

TOM DAVIS and
ERNEST A. MICHEL,
Both of Marshall, Minnesota,
Attorneys of Record for Defendant in Error.
JOHN I. DAVIS,
Of Counsel,
Benson, Minnesota.

Received a copy of the foregoing notice, brief and appendix thereto attached, by personal service thereof this 29th day of November, A. D., 1915.

E. C. LINDLEY,
St. Paul, Minnesota,
Attorney of Record for Plaintiff in Error.

Respectfully submitted,

STATEMENT OF THE CASE.

This is a personal injury action. The case was tried in the District Court of Meeker County, Minnesota, and a verdict rendered by a jury in favor of the Plaintiff (*Defendant in Error here*) for $12,500.00.

The railroad company made a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial. Upon such motion the trial Court denied a new trial, conditioned upon the acceptance by the Plaintiff (*Defendant in Error here*) of the reduction of the verdict to $10,000.00. This reduction

was consented to and thereupon the motion for a new trial was denied.

The railroad company appealed to the Supreme Court of the State of Minnesota, and the Supreme Court of Minnesota, by a unanimous opinion, affirmed the Order of the lower Court in all things.

Thereafter judgment was entered in the District Court of Meeker County, Minnesota, another appeal taken from such judgment and an affirmance by the Supreme Court of the State of Minnesota of the judgment so entered. From this judgment a Writ of Error was sued to the Supreme Court of the United States.

THE COMPLAINT.

The complaint in this action alleged that O. B. Knapp, Plaintiff, was injured while working for the railroad company around certain machinery, which was dangerous and unguarded.

The complaint was silent as to Interstate Commerce, and recovery was sought under a Statute of the State of Minnesota, requiring all dangerous machinery to be guarded to protect workmen employed about the same.

THE ANSWER.

The Answer, after a general denial, alleged "That at the time Plaintiff received said injuries he was engaged in work connected with the movement of Interstate Commerce." This claim of Interstate Commerce therefore was set up by the Plaintiff in Error and not by Knapp.

THE REPLY.

The Reply was a general denial.

STATEMENT OF THE FACTS.

INTERSTATE COMMERCE STIPULATED.

Before any evidence was taken in the case, the Answer having alleged that the injury occurred while the Plaintiff was engaged in working in Interstate Commerce, the following stipulation was entered into:

"It is stipulated by and between the Plaintiff and Defendant that the Plaintiff at the time of his injury alleged in the Complaint was engaged in Interstate Commerce and that the Defendant was engaged in Interstate Commerce and the Complaint may be amended to conform to the facts as stated here."

FACTS UNDISPUTED.

Upon the trial of the case in the District Court of Meeker County, Minnesota, evidence was introduced by Plaintiff and witnesses in his behalf, showing the machinery to be dangerous and showing that it was practicable to guard the same, but no testimony was introduced or offered by the Defendant.

There is no dispute as to the facts in the case, the only evidence being that of the Plaintiff and two of his witnesses.

CONTENTION OF PLAINTIFF IN ERROR.

As stated by the Supreme Court of the State of Minnesota, the contentions of the Plaintiff in Error before that Court were as follows:

"THE CONTENTION IS THAT NO NEGLIGENCE ON THE PART OF DEFENDANT WAS PROVEN; THAT THE PLAINTIFF'S ASSUMPTION OF THE RISK FROM WHICH HE WAS INJURED, CONCLUSIVELY APPEARED; THAT THERE WAS A FAILURE TO PROVE DEFENDANT'S NEGLIGENCE THE PROXIMATE CAUSE", and excessive damages, which is not a question for this Court.

Knapp vs. Great Northern Ry Co., 153 N. W. 848.

STATEMENT OF FACTS.

The facts were fully and clearly stated by the Supreme Court of the State of Minnesota and we herewith quote the facts as stated in their opinion:

"Plaintiff was a station agent at Dassel, Minnesota. He also had to attend the pump-house, some distance from the station, once or twice a day, so that the water tank for the locomotives was kept filled. The water was supplied by means of a triple pump operated by a gasoline engine. The pump and engine were in a small room. The fly-wheel of the engine was about six feet in diameter, leaving the horizontal shaft connecting with the pump about three feet from the floor. Upon this shaft was the clutch by which the pump was set in motion, and between the clutch and the crank near the fly-wheel were two protruding set screws. After starting the engine, which had to be done by

turning the fly-wheel. Plaintiff turned down some grease cups on the pump. These cups were between the pump and the rear wall of the building. In order to throw the clutch to start the pump Plaintiff had to pass near the shaft mentioned. He was in a hurry, and claims that as he so attempted to pass he lost his balance, either through a slip upon the greasy floor or a jerk by his coat being drawn into the fly-wheel or shaft, and in striking out to catch himself his hand and part of the arm came between the crank of the shaft and top of the hood which partially, but inadequately guarded it. The crank revolved towards the top of this guard. Plaintiff says his arm was cut off so quickly that he did not know it was gone until he saw the blood spurt from the stump. The evidence is very clear that it was practicable and feasible to have guarded the set screws and crank so as to fully protect from danger those who had to pass by."

The case is reported as Knapp vs. Great Northern Railway Company, 153 N. W. 848.

The above facts, as stated by the Minnesota Supreme Court, are in no way disputed, Defendant (*Plaintiff in Error here*) having introduced no evidence whatsoever, upon the trial of the cause, in the District Court of Meeker County, Minnesota.

HAPPENING OF THE ACCIDENT.

We especially call the attention of the Court to the fact that the **Defendant in Error was not injured while he was actually working about the portion of the machine which was unguarded.**

At the time Defendant in Error was injured he was **not working about the fly-wheel** of the engine;

nor the unguarded crank-shaft, but his coat was caught in this fly-wheel, and, as stated by the Minnesota Supreme Court, "he lost his balance, either through a slip upon the greasy floor or a jerk by his coat being drawn into the fly-wheel or shaft, and in striking out to catch himself, his hand and part of the arm came between the crank of the shaft and the top of the hood" and the result was that his arm was cut off at the elbow.

The unguarded portion of the machinery was the portion of the crank-shaft above mentioned. Had the crank-shaft been guarded when plaintiff threw his hand forward to save himself from the fly-wheel he would not have been injured.

Knapp's coat was caught in the fly-wheel, but this did not injure him in any manner and he released himself from this fly-wheel but his arm was taken off in attempting to save himself by throwing his arm forward onto the unguarded portion of the crank-shaft.

INVOLUNTARILY IN CONTACT WITH MACHINERY.

In other words the case is one where a servant involuntarily came in contact with dangerous machinery about which he was working, and **not while he was attempting to do some work about the particular portion of the machinery which injured him.**

It will be noticed that Mr. Knapp, either through a slip upon the greasy floor or because of his coat being drawn into the fly-wheel, was caught in such fly-wheel and thrown forward.

He was not at the time trying to do any work connected with the fly-wheel, nor with the unguarded crank-shaft.

He was simply passing near the fly-wheel and through a slip on the greasy floor or the jerking of his coat, was drawn into the fly-wheel, from which he extricated himself without injury, but was injured by reason of his hand coming in contact with the unguarded portion of the crank-shaft.

The trial Court submitted to the jury the following questions:

Was the Railroad Company negligent?

Was the Plaintiff, Knapp, guilty of Contributory Negligence?

Did the Plaintiff, Knapp, assume the risk of being injured, by working about the machinery in question?

On the question of Assumption of Risk the Court charged the jury very fully and no exception to the charge was taken by the Railroad Company.

The jury returned a general verdict in favor of the Plaintiff under the Court's instructions, the doctrine of Comparative Negligence being submitted to them, as bearing on the question of damages.

ARGUMENTS, POINTS AND AUTHORITIES.

It being admitted that the injury occurred while Defendant in Error, hereinafter called Knapp, was employed in Interstate Commerce, the sole basis of

recovery in this action is under the Employer's Liability Law.

SCOPE OF REVIEW.

This cause comes to the Supreme Court of the United States from a State Court, hence the power to review is controlled by Revised Statutes, Section 709 (Section 237, Judicial Code) (36 Statutes at Large, 1156, Chapter 231, Comp. Stat. 1913, Section 1214), and hence the Court will not consider questions merely incidental and not Federal in character.

Seaboard Air Line Co., vs. Padgett, U. S. Adv. Ops. 1914, Page 481, Decided March 22nd, 1915, 35 Sup. Ct. Rep. 481.

This case, coming from a State Court and not from a Federal Court, comes under Section 709 Revised Statutes, and therefore the Federal Supreme Court is not a Court of general review.

Seaboard Air Line Co. vs. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790.

ASSUMPTION OF RISK.

The questions of Assumption of Risk and Contributory Negligence were the only questions seriously argued or seriously considered in either the Trial Court or the Supreme Court of Minnesota.

That the contentions of the Plaintiff in Error may fully appear we have quoted the assignments

of error of the railroad company in the Supreme Court of the State of Minnesota:

"The Court erred in denying defendant's motion for judgment in its favor notwithstanding the verdict upon the following grounds:

(*a*) That upon the law and the evidence applicable thereto plaintiff is not entitled to recover.

(*b*) That the evidence wholly failed to establish any negligence or liability on the part of defendant.

(*c*) That it conclusively appears from the evidence that Plaintiff's injury resulted from a risk which he assumed as a part of his employment.

(*d*) That defendant was entitled to a directed verdict, which motion therefor was made at the close of the testimony, said motion being as follows:

"The defendant moves that the Court instruct the jury to return a verdict for the defendant for the reason that the Plaintiff has wholly failed to prove the allegations of his complaint and wholly failed to prove negligence on the part of the defendant.

And for the further reason that it conclusively appears from the testimony that the accident was caused and occasioned by risks which the plaintiff assumed as part of his employment;

And for the further reason that any verdict in this case would be based upon mere conjecture or speculation, as the plaintiff has wholly failed to prove what caused the accident."

II.

The court erred in denying defendant's motion

for a new trial on the ground that the said verdict is not justified by the evidence and is contrary to law.

III.

The court erred in denying said motion for a new trial upon the ground of excessive damages, appearing to have been given under the influence of passion and prejudice and not justified by the evidence."

As we understand the decisions of this Court, only the errors urged in the State Supreme Court will be considered on a Writ of Error to the Federal Supreme Court, inasmuch as the latter Court is not a Court of general review, and, as stated in the case of Gilla Valley G. & N. R. Co., vs. Hill, 232 U. S. 94, 58 L. ed. 521, "It is that Court's judgment (The Supreme Court of the State of Minnesota) which is alone subject to our review."

In the Appendix to this Motion we have printed the Assignments of Error which were made the basis of the Writ of Error in this case.

Though the phraseology of the assignments is changed and the words "Federal Employer's Liability Law" appear in all of the same except Number One, the assignments are substantially in accordance with the assignments to the State Supreme Court.

The addition of the words "Federal Employer's Liability Law" were doubtless added to the Assignments of Error so that the same, on their face, would embrace Federal questions, which would give jurisdiction to review.

CONTENTION DEVOID OF MERIT.

While this action arises under the Federal Employer's Liability Law we contend that, within the line of cases of which Erie Ry Co., Plaintiff in Error vs. Solomon, U. S. Adv. Ops. 1914, Page 648, Decided May 10th, 1915, 35 Sup. Ct. Rep. 648, is typical, that **"the contention that the case should have been taken from the jury on the ground stated is so wholly devoid of merit and wanting in substance as to afford no basis for jurisdiction."**

Erie Railroad vs. Solomon, supra.

CHARGE OF THE COURT.

We especially wish it to be made plain that **there was no question raised at the trial that the jury were not properly instructed under the Employer's Liability Law.** The Plaintiff in Error made no request for instructions except to ask for a directed verdict, and took no exception to any instruction given to the jury.

The sole question in this case is whether or not the facts warrant a recovery by Knapp; whether his act in coming near the machinery can be called Assumption of Risk and defeat a recovery, or whether his act was Contributory Negligence.

The trial Court held the facts sufficient, to justify the jury's verdict, and the Supreme Court of Minnesota affirmed this holding.

On the question of Assumption of Risk the trial Court instructed the jury as follows:

"It is the law that a person who undertakes any employment assumes all the risks incident to that employment which are open, obvious and discoverable by ordinary observation, and this applies to the place where the work is performed as well as to the machinery.

It appears that the plaintiff was an old and experienced employee of the defendant, that he had operated the engine and had entire control of its operation and the machinery connected therewith for about nine years continuously, during which time it had been in daily operation and in the same condition in which it was at the time of the accident, and he was bound to know and appreciate all the dangers attending the operation of the engine in the place where it was located and in the condition in which it was as he operated it, which an ordinarily prudent man possessed of ordinary intelligence and common sense and having the knowledge and experience of the plaintiff would know and appreciate, and if he sustained his injury in consequence of being exposed to a danger which he knew and appreciated or from his knowledge, experience and observation ought to have known and appreciated, he assumed the risk of such an injury and is not entitled to recover even if the defendant was negligent in failing to guard the crank shaft and screws in any other manner than it was and is here made to appear by the evidence.

A corporation necessarily acts by and through its agents and servants, and, as stated, the plaintiff was and for many years had been the defendant's agent at Dassel, and, so far as appears, in full charge of all the machinery in question and had full knowledge of its condition, and that he gave the same his personal attention, on the average once daily for about nine years, and during all that time the engine—the crank shaft and the set screws—remained in the same condition with respect to guards that it was in at the

time of the accident, and he never at any time or in any way notified or informed the defendant or any of its officers or employees that its condition was in any way dangerous. If then you find that under the circumstances here made to appear the plaintiff understood and appreciated the risks incident to the operation of the engine in that condition and made no complaint to the defendant that the crank shaft and screws were imperfectly guarded, and if you further find that such imperfect guarding of the crank shaft and bolt resulted in the injury complained of, still he cannot recover and your verdict must be for the defendant."

Under the above instructions, which fully lay down the rule as to Assumption of Risk, the verdict was rendered in favor of the Defendant in Error. No claim can be made that the jury were in any way misled by the charge on Assumption of Risk.

CONTENTIONS OF DEFENDANT IN ERROR ON MOTION TO DISMISS, AFFIRM OR ADVANCE TO SUMMARY DOCKET.

FIRST CONTENTION.

That the Writ of Error in this action be dismissed on the ground that no question is presented authorizing this Court to take jurisdiction of the above entitled action.

While this cause comes under the Federal Employer's Liability Law, **there is no substantial ground or basis for the Writ of Error in this action.**

No question as to the construction of the Federal Employer's Liability Law is raised.

No question as to any instructions to the jury under this Act is raised either as to requested instructions or as to instructions actually given by the Trial Court.

The question in the case is this: Can Knapp's act be called Assumption of Risk instead of Contributory Negligence—and if Assumption of Risk does it appear as a matter of law, so that this court must reverse the Minnesota Supreme Court on that question, which, under the Minnesota rule is a question for the jury.

No request to charge the jury relative to Assumption of Risk was made, except the general motion for directed verdict.

The question of Assumption of Risk, the question of Negligence and Contributory Negligence are questions of fact, and these questions of fact are to be determined by the jury the same as are other questions of fact.

As said in Jones vs. East Tennessee B. & G. Ry Co. 128 U. S. 443, 32 L. ed. 478: **"We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."**

We cannot see how the pure question of Assumption of Risk, which we claim cannot properly be raised on the facts in this case, can present a Federal Question.

From Plaintiff in Error's standpoint, even, Assumption of Risk is not a Federal Question authorizing

jurisdiction. Whether all the facts were known and appreciated and the danger understood and appreciated, were purely questions of fact and cannot justify a Writ of Error to this Court.

SERVANT INVOLUNTARILY IN CONTACT WITH DANGEROUS MACHINERY.

The injured servant involuntarily came in contact with dangerous machinery and was thereby injured and whether he assumed the risk was a question of fact for a jury to determine, within the case of Jones vs. East Tennessee, supra

The Minnesota rule is "that where a servant, lawfully in the vicinity of unguarded, dangerous machinery, slips or loses his balance by some mishap and is brought involuntarily in contact with such machinery, while the same is in motion, and is injured thereby, the fact that he knew that the machinery was unguarded and that he would be injured by such an occurrence, if it did happen, does not of itself establish as a matter of law that he either assumed the risk or was guilty of contributory negligence."

Falconer vs. Sherwood, 118 Minn. 357, 136 N. W. 1039.

While the above quoted decision arose wherein the facts showed that the unguarded machinery was required to be guarded by the statute, the rule of law is the same whether the statute required the guarding of the machinery or not.

If the servant involuntarily comes in contact with dangerous, unguarded machinery by some mis-

hap, such as slipping or losing his balance, he cannot be said to have assumed the risk of being injured thereby.

The Court will bear in mind that this is the sole question in the case, whether a recovery can be defeated by calling the acts of Knapp, Assumption of Risk instead of Contributory Negligence. There was no request for any especial construction of the statute, and the language of the Court in the case of Seaboard Air Line Co., vs. Padgett, supra, is especially applicable, wherein the Court says:

"The trial court gave to the jury every instruction concerning the meaning and application of the Act of Congress asked by the company, and therefor there is no ground whatever for saying that the view of the statute relied upon by the company was not given to the jury."

SECOND CONTENTION.

In the alternative the Defendant in Error moves this Court that the judgment of the Supreme Court of the State of Minnesota be affirmed, on the ground that it is manifest that the Writ of Error therein was taken for delay only; and that ten per cent damages be awarded to Defendant in Error on the ground that said appeal was taken and said Writ of Error sued out merely for delay.

From the decision of the Supreme Court of the State of Minnesota in this case it is apparent that the Writ of Error was sued out merely for delay and it is our contention that damages should be awarded to Defendant in Error under Rule Twenty Three of this Court.

The Writ of Error in this case is based on nothing but questions of the general law of negligence and the general law of assumption of risk.

There is no question of the construction of the statute under which the action was tried, and it occurs to us that the bare fact that a Writ of Error has been sued out in a cause of this nature, where the sole question is a question of fact, that the conclusion is inevitable that the Writ of Error was sued out for delay only and is unsubstantial and frivolous.

THIRD CONTENTION.

That the questions on which the decision of the cause depends are so frivolous as not to need further argument.

What has heretofore been said under Contentions First and Second applies with equal force to the contention last above stated.

FOURTH CONTENTION.

In case the above motions be not granted, then the Defendant in Error will move the Court that the above entitled cause be transfered for hearing to the summary docket of said Court because the case is of such a character as not to justify extended argument.

Should this Court conclude that there is a Federal question involved in the Writ of Error in this case of "sufficient strength to exclude the conception that the contention is frivolous" then we contend that this

cause should be transfered for hearing to the Summary Docket.

The questions involved in the Writ of Error raised **"no matters of doctrinal importance"** within the case of Seaboard Air Line Co. vs. Padgett, supra.

A decision of this case can serve no useful guide as a precedent in the construction of the Employer's Liability Law. It is important solely to O. B. Knapp and the Great Northern Railroad Company.

No doctrinal question being involved, the questions being solely questions of the general law of Negligence, Contributory Negligence and Assumption of Risk, certainly this case should be advanced to the Summary Docket and summarily determined by this Court.

Under the well settled rule in this Court, the only question to be determined on this Writ of Error is whether plain error appears. Certainly no error appears relative to any construction of the Employer's Liability Law or any instruction given to the jury or any requested instruction which was refused.

ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

Strictly speaking there is no question of assumption of risk in this case.

The injury was caused, in part, by the negligence of the employee, Knapp. The floor about the engine was greasy and slippery. As stated by the Minnesota Supreme Court, Knapp "either slipped on the greasy floor, or inadvertently and **negligently came too**

near the shaft and fly-wheel. It does not matter which, because the jury could well say neither came within the risks understood and appreciated by the plaintiff, that it was an involuntary and unforseen mishap. **Both causes given for losing his balance may be referable to** PLAINTIFF'S NEGLIGENCE RATHER THAN TO AN ASSUMPTION OF KNOWN AND APPRECIATED DANGER ARISING OUT OF DEFENDANT'S NEGLIGENCE."

Knapp vs. Great Northern Ry Co. 153 N. W. 848.

In this case counsel for Plaintiff in Error are attempting to call the act of Knapp Assumption of Risk when these acts are, in fact, acts of Contributory Negligence.

It is claimed that Knapp was injured because of the fact that he allowed the floor to become greasy and slippery and slipped and fell into the fly-wheel of the pumping machine. If this be correct then his acts were **positive acts of negligence** and would constitute Contributory Negligence, but not Assumption of Risk.

It is not simply the **passive act** of Mr. Knapp **in continuing on duty** for the defendant company that caused his injury.

Had the fly-wheel been defective, had Knapp known of this, and notwithstanding his knowledge, continued to work in the vicinity thereof, and the fly-wheel become loosened from the shaft and injured him, then it might be said that the doctrine of Assumption of Risk would apply, but **where the negligence attributable to the employee is an active negligence, not a mere passive act, where it involves some fault or breach of duty on the part of the servant, then the act is contributory negli-**

gence and not assumption of risk.

Mr. Justice Pitney, in the case of Seaboard Air Line Company vs. Horton, 233 U. S. 492, 58 L. ed. 1062-1070, shows the distinction between Contributory Negligence and Assumption of Risk.

"Contributory Negligence involves the notion of SOME FAULT OR BREACH OF DUTY ON THE PART OF THE EMPLOYEE, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, CONTRIBUTORY NEGLIGENCE is sometimes defined as a FAILURE TO USE SUCH CARE FOR HIS SAFETY as ordinarily prudent employees in similar circumstances would use. On the other hand, the ASSUMPTION OF RISK, EVEN THOUGH THE RISK BE OBVIOUS, may be **free from any suggestion** OF FAULT or of NEGLIGENCE on the part of the employee. The risk may be present, notwithstanding the exercise of all REASONABLE CARE on his part."

Under the rule above given it is plain that the act of Knapp in the case at bar comes under the head of CONTRIBUTORY NEGLIGENCE and not under the head of ASSUMPTION OF RISK.

CONTRIBUTORY NEGLIGENCE, as said by Justice Pitney, involves the notion of SOME FAULT OR BREACH OF DUTY ON THE PART OF THE EMPLOYEE—such as the failure to keep the floor free from oil and grease—whereas ASSUMPTION OF RISK, even though the risk be obvious, MAY BE FREE FROM ANY SUGGESTION OF FAULT OR NEGLIGENCE on the part of the employee.

In the case of Yazoo & Mississippi Valley Ry Co., Plaintiff in Error vs. Wright, U. S. Adv. Ops.

1914, Page 130, decided December 14th, 1914, 35 Sup. Ct. 130, the sole question was the question of assumption of risk.

After the statement of facts in that case Mr. Justice White says:

"Whatever may be the difficulty of distinguishing in many cases between the application of the doctrine of assumption of risk and the principles of contributory negligence, that there is no such difficulty here is apparent, since the facts as stated absolutely preclude all inference that the engineer knew, or, from the facts shown, must be presumed to have known, that the coal cars were protruding over the track on which he was moving, and deliberately elected to assume the risk of collision and great danger which would be the inevitable result of his continuing the forward movement of his train."

Yazoo, etc., Co. vs. Wright, supra.

Applying the above rule to the case at bar, **the facts stated absolutely preclude all inference that Knapp deliberately elected to assume the risk of his hand coming in contact with the unguarded crank-shaft. He was not working about this unguarded crank-shaft at the time he was injured** but was passing by another part of the machinery, and was **involuntarily** thrown, **owing to some mishap,** onto the fly-wheel and then, in the effort to save himself, threw himself forward onto the unguarded crank-shaft.

There certainly is no room for the contention that he **"deliberately elected to assume the risk of collision and great danger, which would be the inevitable result of his continuing"** in the employment of the railroad company.

In the case of Yazoo & Mississippi Valley Railway Company vs. Wright, supra, the Court further said:

"Thus it is urged that, as in a railroad yard there was danger to arise from the protrusion of cars negligently placed by employees of the company, a danger which the engineer might have known might arise, therefore he assumed the risk of such danger."

The Court, however, held that this would constitute contributory negligence and not assumption of risk.

The question of assumption of risk is a question for the jury, under proper instructions, from the evidence in this case, and, within the case of McGovern vs. Philadelphia and R. R. Ry Co. U. S. Adv. Ops. Page 127, decided December 14th, 1914, 35 Sup. Ct. Rep. 127, **"what deductions there were to be made from it were for the jury to make."**

The question of negligence and assumption of risk were for the jury to determine.

Central Vermont Ry Co. vs. White, U. S. Adv. Ops. 1914, Page 864, 35 Sup. Ct. Rep. Page 864.

There is nothing in the Record even tending to show that Knapp was aware of the risk arising from the unguarded crank-shaft or that he was aware of the fact that he was liable to be injured by being caught in the fly-wheel and drawn into this unguarded crank-shaft. Such a contingency, doubtless never occurred to him. It will not occur to any employee that he might be injured by coming in contact with such unguarded machinery, when he came in contact with the same involuntarily and not of his own volition.

The manner of the happening of the accident

was such that it could not have been anticipated by Knapp nor could he be held to have assumed the risk of being injured in such a manner. There is nothing to show that he was aware of any danger likely to occur to him from said unguarded crank-shaft when he was not working about that particular portion of the machinery.

As said in the case of Seaboard Air Line Company vs. Horton, 233 U. S. 492, 58 L. ed. 1062, this risk **"was not naturally incident to the occupation"** of Knapp, but arose, in part, out of his failure to exercise due care for his own safety—Contributory Negligence.

While we realize that the Supreme Court may re-examine the evidence in a case coming from a State Supreme Court "this is done, not for the purpose of retrying questions of fact, which we may not do, but, first, to see whether the question raised was of a Federal nature; second, to see whether error was committed in the decision of it."

St. Louis I. M. & S. R. Co. vs. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

And, in the case at Bar the sole question is whether error was committed in the decision of the jury, affirmed by the trial Court and the Supreme Court of the State of Minnesota, in holding that Knapp did not, as a matter of law, assume the risk of being injured by the unguarded crank-shaft, **when he was not working around or about that piece of machinery at the time of his injury,** but came involuntarily in contact therewith.

The question whether or not Knapp knew and appreciated or understood the danger to which he was exposed was a question of fact.

The question whether he knew or appreciated that he would be injured by the defective and unguarded crank-shaft, when he was not working about that particular portion of the machinery, was likewise a question of fact for the jury to determine.

In fact, generally speaking, the question of assumption of risk is a question for the jury and not a question for the Court; it is a question of fact, and these questions of fact are for the determination of a jury the same as any other questions of fact.

See Jones vs. East Tennessee B. & G. Ry Co., 128 U. S. 443, 32 L. ed. 478.

Mr. Justice Brewer, in the case of Smiley vs. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289, says:

"The verdict of the jury settles all questions of fact."

In Missouri K. & T. R. Co. vs. Haber, 169 U. S. 613-639, 42 L. ed. 878-887, 18 Sup. Ct. Rep. 488, it is said: **"Much was said at the bar about the finding of the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury, and this court can only consider whether the statute, as interpreted by the jury, was in violation of the Federal Constitution.**

Chicago B. & Q. Ry Co. vs. Chicago, 166 U.S. 226, 242-246, 41 L.ed. 979, 986, 988, 17 Sup. Ct. Rep. 581."

The jury, by their general verdict found that Knapp did not know or understand and appreciate the risk to which he was exposed by working in the pump-house of defendant. This question of fact was a question left to the jury under instructions,

of which no complaint was made at the trial, and, under the well settled rule of this Court, this was imminently a question for the jury and their verdict settled the facts.

As this case comes from a State Court, "We do not review questions of fact, but accept the conclusions of the state tribunal as final."

Chrisman vs. Miller, 197 U. S. 313, 49 L. ed. 770.

Should this Court conclude that the questions raised are of sufficient merit to avoid the conclusion that they are frivolous, still the questions are of no great importance and this cause should be advanced to the Summary Docket.

TOM DAVIS and
ERNEST A. MICHEL,
Both of Marshall, Minnesota,
Attorneys of Record for Defendant in Error.

JOHN I. DAVIS,
Of Counsel,
Benson, Minnesota.

APPENDIX.

Pursuant to the rules and practices of this Honorable Court, and for the purposes of these motions only, Defendant in Error has caused to be printed the Complaint in the original action, the Answer and the Reply therein, the Opinion of the Supreme Court of Minnesota, and the Assignments of Error to the Supreme Court of Minnesota, made the basis for the Writ of Error in this action.

Authorities:

Carey vs. Houston, 150 U. S. 179.
Rouch vs. Nevin, 128 U. S. 579.

STATE OF MINNESOTA, COUNTY OF MEEKER,

IN DISTRICT COURT.

O. B. KNAPP,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant.

COMPLAINT.

Plaintiff for his complaint in the above entitled action alleges and shows to this Court:

First: That the defendant now is and at all times hereinafter mentioned has been a railroad corporation owning and operating a line of railroad extending into and through the Village of Dassel in the County of Meeker and State of Minnesota.

Second: That at said Village of Dassel, Meeker County, Minnesota, defendant has and did have and maintain at all times herein mentioned a certain pump-house, in which was situate a certain pumping engine and machinery; that on or about the 12th day of May, 1914, this plaintiff was employed by defendant as its agent and servant and as such was working in the vicinity of and around said pump and machinery in said pump-house of defendant in said Village of Dassel, Minnesota.

Third: That on or about said 12th day of May, 1914, while this plaintiff was so the servant and employee of said defendant, he was required to and did work in close proximity to a certain dangerous machine and pump in said pump-house and that there was situated on said machine a certain dangerous and unguarded clutch or knuckle which revolved, and crank-shaft both of when said machine was in motion, at a high rate of speed.

Fourth: That said machinery because of said unprotected and unguarded clutch and crank-shaft was dangerous to employees working in the vicinity thereof, and that at all times herein mentioned it was feasible and practicable to guard and protect the same so that employees working in the vicinity thereof would not be liable to receive injuries by coming in contact therewith.

Fifth: That said defendant negligently, recklessly and carelessly failed and neglected to protect or guard

said dangerous and unprotected clutch and crank-shaft and negligently failed to provide any guard or protection whatsoever for the same to the end that the place in which plaintiff was compelled to work would be made reasonably safe for such purpose.

Sixth: That on or about said 12th day of May, 1914, and while plaintiff was working around and about and in the vicinity of said dangerous and unguarded clutch and crank-shaft the sleeve of plaintiff's right arm was caught by said unguarded and unprotected clutch and plaintiff's arm was pulled and jerked into said rapidly revolving crank-shaft and machinery and his arm so severely injured, torn and lacerated that the same had to be severed and amputated just below the elbow; that plaintiff received a severe shock to his nervous system by reason of the severe and sudden strain, and jerk at said time and that plaintiff was pulled and thrown forward onto said machine and received a severe and permanent strain and injury to his back and spine and that as a result of said injury plaintiff's general health has been greatly and seriously affected and that he received internal injuries the exact and precise nature of which he is at this time unable to state.

Seventh: That by pleading the specific acts of negligence hereinbefore recited, plaintiff does not waive the right to prove any other acts of negligence not inconsistent with the acts of negligence hereinbefore set forth.

Eighth: That prior to the injury to plaintiff he was an able-bodied man and could and did earn the sum of One Hundred and Twenty Dollars per month; that as a result of said injury he has been incapacitated and lost his ability to perform any manual labor, and totally lost his earning capacity.

Ninth: That as a result of said injuries plaintiff has been obliged to pay out and expend large sums for medical attention, medicines and nursing and will be compelled so to do for the rest of his natural life.

Tenth: That by reason of all the facts aforesaid plaintiff has been injured to his damage in the sum of Thirty-Five Thousand ($35,000.00) Dollars.

Wherefore, Plaintiff demands judgment against said defendant in the sum of Thirty-Five Thousand ($35,000.00) Dollars together with the costs and disbursements herein.

JOHN I. DAVIS,
Plaintiff's Attorney,
Benson, Minnesota.

DAVIS & MICHEL,
Plaintiff's Attorneys,
Marshall, Minnesota.

Dated this 9th day of October, 1914.

(*Title of Cause*).

ANSWER.

Defendant answering the complaint of the plaintiff herein:

First: Admits that it is a railroad corporation and admits that it owns and operates the line of rail-

road referred to in plaintiff's complaint, and alleges that said line of railroad so referred to is an interstate railroad running into and through the State of Minnesota and other states, and that there is operated on said railroad by this defendant trains carrying interstate commerce.

Second: Defendant admits that at the Village of Dassel in Meeker County it maintains a pump house in which is situated a certain pumping engine and machinery, and alleges that said engine and machinery furnished water to defendant's engines engaged in the transportation of interstate commerce.

Third: Defendant admits that this plaintiff was employed by it in the operation of its said pumping station at said Dassel, Minnesota and admits that on the 12th day of May, 1914, while this plaintiff was engaged in work connected with the operation of said pumping station that plaintiff received personal injuries resulting in the loss of one of his arms below the elbow.

Fourth: Defendant alleges that at the time plaintiff received said injuries he was engaged in work connected with the movement of interstate commerce.

Fifth: Defendant further answering alleges that such injuries as plaintiff received were not caused or occasioned by any negligent act or omission of this defendant, but the same were caused and occasioned by plaintiff's own contributory negligence and carelessness.

Sixth: Defendant further answering alleges that such injuries as plaintiff received while engaged in performing the work as alleged in his complaint involved certain dangers, risks and hazards which were incident to such work, all of which dangers, risks and

hazards plaintiff well knew and appreciated, and all of which plaintiff assumed, and that such injuries as plaintiff received resulted from the dangers, risks and hazards so appreciated and assumed by plaintiff as aforesaid.

Seventh: Except as hereinbefore admitted or otherwise answered, defendant denies each and every allegation in plaintiff's complaint contained.

Wherefore, defendant prays that plaintiff take nothing by this action and that it have judgment for its costs and disbursements herein.

M. L. COUNTRYMAN and
A. L. JANES,
Attorneys for Defendant,
203 Great Northern Building,
St. Paul, Minnesota.

(*Title of Cause*).

REPLY.

Plaintiff, for his Reply to the Answer of the Defendant in the above entitled action alleges and shows to this Court:

Plaintiff denies each and every allegation and each and every part thereof in said answer contained except as the same admits the allegations of plaintiff's complaint.

Wherefore, Plaintiff prays judgment as demanded in his said complaint.

JOHN I. DAVIS,
Plaintiff's Attorney,
Benson, Minnesota.

DAVIS & MICHEL,
Plaintiff's Attorneys,
Marshall, Minnesota.

Dated this 21st day of November, 1914.

KNAPP vs. GREAT NORTHERN RAILWAY CO.

(No. 19366 [240].)

(Supreme Court of Minnesota, July 16, 1915).

SYLLABUS.

In this action under the Federal Employer's Liability Act the evidence is held to make the issues of defendant's negligence, plaintiff's contributory negligence and assumption of risk for the jury and not the court.

It was also for the jury to determine whether defendant's negligence was the proximate cause of the injury.

The damages as reduced are not so excessive as to warrant interference by this court.

Affirmed.

OPINION.

Plaintiff lost his arm while at work for defendant. He alleged defendant's negligence to be the cause of his misfortune, and recovered heavy damages. The court denied defendant's motion for judgment notwithstanding the verdict, but ordered a new trial unless plaintiff consented to a reduction of the verdict. Plaintiff consented and defendant appeals.

It was conceded that when the injury was received plaintiff as a servant of defendant was engaged in work pertaining to defendant's business of a common carrier of interstate commerce. The pleadings were amended upon the trial so as to predicate recovery under the provisions of the Federal Employer's Liability Act.

Our state statute has therefore no bearing upon the issue of negligence, contributory negligence, or assumption of risk. This is fully set at rest in Seaboard Air Line vs. Horton, 233 U. S. 492. The contention is that **no negligence** on the part of defendant was proven; that the defendant's **assumption of risk** from which he was injured **conclusively appeared**; that there was a **failure to prove** defendant's **negligence the proximate cause**; and that excessive damages were awarded.

Plaintiff was the station agent at Dassel, Minnesota. He also had to attend the pump-house, some distance from the station, once or twice a day, so that the water tank for the locomotives was kept filled. The water was supplied by means of a triple pump operated by a gasoline engine. The pump and engine

were in a small room. The fly-wheel of the engine was about 6 feet in diameter, leaving the horizontal shaft connecting with the pump about 3 feet from the floor. Upon this shaft was the clutch by which the pump was set in motion, and between the clutch near the fly-wheel were two protruding set screws. After starting the engine, which had to be done by turning the fly-wheel, plaintiff turned down some grease cups on the pump. These cups were between the pump and the rear wall of the building. In order to throw the clutch to start the pump plaintiff had to pass near the shaft mentioned. He was in a hurry, and claims that as he so attempted to pass he lost his balance, either through a slip upon the greasy floor or a jerk by his coat being drawn into the fly-wheel or shaft, and in striking out to catch himself his hand and part of the arm came between the crank of the shaft and top of the hood which partially, but inadequately guarded it. The crank revolved towards the top of this guard. Plaintiff says his arm was cut off so quickly that he did not know it was gone until he saw the blood spurt from the stump. The evidence is very clear and it was practicable and feasible to have guarded the set screws and crank so as to fully protect from danger those who had to pass by. We think the jury was justified in finding the defendant negligent under the common law rule governing the duties of the master. See cases cited under Section 5895, Dunnell's Minnesota Digest.

Under the federal act contributory negligence does not defeat recovery, it merely serves to reduce the damages, while assumption of risk, under the facts of the case at bar, is a complete defense. For that reason plaintiff's counsel desires everything which tends toward proving assumption of risk attributed to plaintiff's negligence, and defendant's counsel is equally eager to resolve all appearance of contributory negligence into an assumption of risk.

Plaintiff had had charge of the running of the pumping outfit, not including the repairs thereon, for over eight years. He was of mature age, no doubt, of average intelligence. Had he been caught on the set screws or got his hand between the guard and crank while working over, or with, the shaft the legal inference might be conclusive that the risk incident thereto was assumed by him. But he had just turned some grease cups on the rear of the pump and started to go to the front of the engine to throw the clutch in gear. In so doing it is easy to understand how the jury could find that in his hurry he either slipped on the greasy floor, or inadvertently and negligently came too near the shaft and fly-wheel. It does not much matter which, because the jury could well say neither came within the risks understood and appreciated by plaintiff, that it was an involuntary and unforseen mishap. Both causes given for losing his balance may be referable to plaintiff's negligence rather than to an assumption of known and appreciated danger arising out of defendant's negligence. We appreciate this to be a very close case upon the issue of assumption of risk, but believe it to come within such decisions as Glockner vs. Harwood Mfg. Co., 109 Minn. 30, Snyder vs. Waldorf Box Board Co., 110 Minn. 40, and Falconer vs. Sherwood, 118 Minn. 357.

Whether the defense of assumption of risk has been made out is ordinarily for the jury. And so it would be for the jury to say whether facts and circumstances proven establish contributory negligence or assumption of risk, for in some respects the two defenses blend. In Jones vs. East Tennessee V. & G. Ry Co., 128 U. S. 443, 32 L. ed. 478, it was said with reference to the issue of contributory negligence: "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." This state-

ment was approved in Washington & G. Ry Co. vs. McDade, 135 U. S. 554, 34 L. ed. 241, wherein were involved the issues found in the case at bar. See also, Choctaw O. & G. Ry Co. vs. McDade, 191 U. S. 64, 48 L. ed. 96; McGovern vs. Philadelphia & Reading Ry Co. 235 U. S. 389; Seaboard Air Line Co. vs. Padgett, 236 U. S. 668. The learned trial court submitted the issue of contributory negligence and assumption of risk to the jury so fully and accurately that no fault is found by defendant in that respect.

It is also said plaintiff's negligence was the sole cause of the injury. That had he not slipped or come so near that his clothing had caught the accident would not have happened. We think it more reasonable to say that his stumbling would have been of no serious consequence had there been no negligence in leaving a dangerous place exposed upon the machinery. The conclusion is readily and properly at hand that the absence of a suitable guard for the crank-shaft was the proximate cause, Rase vs. Minneapolis, St. P. & S. Ste. M. Ry Co., 107 Minn. 260; Swick vs. Aetna Co., 147 Mich. 454.

The trial court reduced the damages to $10,000. Plaintiff, when injured, was near 60 years old and earning about $120.00 per month. He lost his right arm at the elbow. He was right-handed. The amount as approved by the trial court is very liberal, but not excessive in the opinion of a majority of this court.

Affirmed.

In the SUPREME COURT of the UNITED STATES.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

O. B. KNAPP,
Defendant in Error.

ASSIGNMENTS OF ERROR.

Comes now the Great Northern Railway Company, Plaintiff in Error, in the above entitled cause, and avers and shows that in the Record and proceedings in said cause the Supreme Court of the State of Minnesota erred to the grievous injury and wrong of the Plaintiff in Error herein, and to the prejudice and against the rights of the Plaintiff in Error, in the following particulars, to-wit:

I.

The said Supreme Court erred in affirming the judgment entered in the District Court in favor of Plaintiff in Error.

II.

The said Supreme Court erred in holding under the Federal Employer's Liability Act that on the undisputed facts of the case the right of the Defendant in Error to recover was not barred by the common law doctrine of assumption of risk.

III.

The said Supreme Court erred in failing to apply to the undisputed facts of the case under the Federal Employer's Liability Act the principles of the doctrine of assumption of risk as they existed at common law.

IV.

The said Supreme Court erred in not reversing the judgment of the trial court and in denying to Plaintiff in Error its rights under the Federal Employer's Liability Act.

V.

The said Supreme Court erred in failing to hold under the provisions of the Federal Employer's Liability Act that the Defendant in Error assumed the risk of being injured from the unguarded set screws and crank-shaft.

VI.

The said Supreme Court erred in holding on the undisputed facts of the case under the provisions of the Federal Employer's Liability Act that Plaintiff in Error was guilty of negligence.

WHEREFORE, For these and other manifest errors appearing in the Record, the said Great Northern Railway Company, Plaintiff in Error, prays that the

judgment of the said Supreme Court of the State of Minnesota be reversed and set aside and held for naught, and that judgment be rendered for Plaintiff in Error granting it its rights under the statutes of the United States, and Plaintiff in Error also prays for judgment for its costs.

E. C. LINDLEY,
Attorney for Great Northern Railway Company,
Plaintiff in Error.

M. L. COUNTRYMAN,
A. L. JANES,
Of Counsel.

GREAT NORTHERN RAILWAY COMPANY *v.* KNAPP.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 690. Argued February 24, 1916.—Decided March 20, 1916.

Where there is no question as to the interpretation of the Employers' Liability Act or as to the definition of legal principles in its application, but the question is simply whether there were matters for determination of the jury, this court, with due regard to the appropriate exercise of its jurisdiction, will not disturb the decision of the court below unless error is palpable.

In cases of this sort arising under the Employers' Liability Act, not be-

ing of exceptional character, this court confines itself to the mere announcement of its conclusion, as it does, in this case, of affirmance.
130 Minnesota, 405, affirmed.

THE facts, which involve the validity of a verdict and judgment in suit for personal injuries under the Federal Employers' Liability Act, are stated in the opinion.

Mr. A. L. Janes, with whom *Mr. E. C. Lindley* and *Mr. M. L. Countryman* were on the brief, for plaintiff in error.

Mr. Tom Davis, with whom *Mr. Ernest A. Michel* and *Mr. John I. Davis* were on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This action was brought under the Federal Employers' Liability Act. The plaintiff (defendant in error) was the station agent at Dassel, Minnesota. It was a part of his duty to attend the pump house some distance from the station, once or twice a day, and keep filled the water tank for locomotives. The water was pumped by means of a gasoline engine, and the pump and engine were in a small room. In proceeding to start the pump at the time in question, the plaintiff's arm was caught in the clutch of the engine and cut off. As the Supreme Court of the State put it, the plaintiff claimed that "he lost his balance, either through a slip upon the greasy floor or a jerk by his coat being drawn into the fly wheel or shaft, and in striking out to catch himself his hand and part of the arm came between the crank of the shaft and top of the hood which partially but inadequately guarded it." The state court deemed the evidence to be 'very clear' that it was practicable to interpose safeguards 'so as to fully protect from danger those who had to pass by.' The plaintiff alleged negligence in his employer, in failing to provide suitable

protection; the company denied negligence and insisted upon the defense of assumption of risk. The trial court held that upon the evidence these questions were for the jury, and there was a verdict for the plaintiff. On motion, a new trial was ordered unless the plaintiff should remit a portion of the damages, and, this being done, judgment was entered which was affirmed by the Supreme Court of the State. 130 Minnesota, 405.

It was conceded that when the injury was received, plaintiff was engaged in work pertaining to the defendant's business as a common carrier in interstate commerce, and that the Federal Act applied. The court recognized that, if assumption of risk by the plaintiff was made out, it would bar recovery under the Act. *Seaboard Air Line Railway* v. *Horton*, 233 U. S. 492. The court charged the jury accordingly, and there was no exception by the defendant to the charge, or request on its part for any additional instructions,—the defendant contenting itself with its motion for dismissal or for a direction of a verdict in its favor. The case, then, is one in which there is no question as to the interpretation of any provision of the Federal Act or as to the definition of legal principle in its application, but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is palpable. The present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion. *Seaboard Air Line Railway* v. *Padgett*, 236 U. S. 668, 673; *Seaboard Air Line Railway* v. *Koennecke*, 239 U. S. 352, 355.

Judgment affirmed.